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THE PLEDGE AS AN ILLINOIS SECURITY DEVICE: PART II*

Elliot G. Robbins

III. RIGHTS AND DUTIES PRIOR TO MATURITY

B. PLEDGEE'S POWER TO ASSIGN

NOTICE has been taken of the fact that a pledge is an interest arising out of a bailment. In that regard, it has been the traditional view that a bailee, since he has no more than a common-law possessory lien, should not be permitted to transfer his interest because a lien, being simply a personal privilege to withhold possession, is made operative only by reason of its coercive effects. As a consequence, a transfer of possession by a bailee, even if he meant to do no more than assign both the debt due and the lien without thought of conversion, would be improper in the absence of consent by the bailor. The pledgee, on the contrary, may assign the debt and repledge the security since his interest therein, unlike that held by way of lien, is a property right.⁶⁸ It can, therefore, no longer be doubted that a pledgee is perfectly free to dispose of his interest to a third person provided the act of transfer does not cause an assertion, either on the part of the pledgee or by such third person, of a right in the pledged

* Part I hereof appeared in 31 CHICAGO-KENT LAW REVIEW 99-140.

⁶⁸ Zimpleman v. Veeder, 98 Ill. 613 (1881); Bradley v. Parks, 83 Ill. 169 (1876); Belden v. Perkins, 78 Ill. 449 (1875).

chattels greater than that given by the original agreement to pledge. For example, a repledge for an amount in excess of the secured debt, or for a term which would mature later than that fixed for the secured debt, would involve an unwarranted assertion of dominion as, in either case, the pledgor would be put to delay or expense when attempting to redeem.⁶⁹ But for this limitation, the reasons in support of allowing an assignment of the debt and the pledge are unassailable. If, as is the case, a debt is assignable, then it follows that an incident of the debt, such as a security interest, ought to be, and is, transferable.⁷⁰

C. RIGHTS AND DUTIES OF PLEDGEE'S ASSIGNEE

It is within the realm of possibility that, after a valid assignment of the pledgee's interest and of the debt, the pledged chattels might suffer an injury or be destroyed. In such a case, there would seem to be no reason why the assignee might not be held liable to the pledgor, although the courts usually assume the point rather than decide it. If the assignee is to enjoy the benefits of the pledgee's rights, it would be no injustice to require him to maintain the same standard of care over the pledged chattels as is required of the pledgee. Nevertheless, either as a matter of convenience or because of the pledgee's superior resources, the pledgor may prefer to hold the pledgee responsible for the loss or

⁶⁹ Brown, § 129; Restate., § 23. See also note in 45 Harv. L. Rev. 1264.

⁷⁰ Accepting the premise that a pledgee may assign his interest, at least two interesting situations could arise. First, suppose the pledgee wishes, in good faith, to assign a partial interest in the secured debt. In that case, the pledgor, at maturity, would be obliged to perform for both the pledgee and the assignee, according to their interests. If the performance should not be severable, or if the pledgor has contracted against a partial performance, only the pledgee could call for performance. To that end, the pledgee would need to retain the pledged chattels and the assignee would, insofar as the pledgor is concerned, have only a pro rata equity in both the secured debt and the pledged chattels. Suppose, on the other hand, only one pledged chattel is given to secure several separate debts. On an assignment of one or more of the separate debts, a problem could arise over the right to possess the pledged chattel. Since it has been given as equal security for all claims, the assignees of the separate claims ought to share the benefit equally, each having a pro rata lien. If the secured claims are to be paid in sequence, possession of the pledged chattel might be passed around among the assignees according to the order of priority of maturity. If there is no priority, as where all claims are scheduled to mature at the same time, the assignee holding the largest claim might have a stronger claim to possession. If neither has priority, and all are of equal value, the pledgee probably ought to retain possession as quasi-trustee for the assignees. In general, see Restate., §§ 30-1.

injury done to the pledged chattels. Such authority as there is would seem to deny the pledgor a cause of action against the pledgee.⁷¹ After the pledgee has legally transferred the property, he ought no longer be held responsible for it unless he knew, prior to the transfer, that the assignee intended to convert. The result would not seem unfair for, as the debt is assignable, the pledgor ought to expect a transfer of the security into the hands of others with the concomitant result that the pledgee would then no longer be able to control the property, hence should be discharged of responsibility therefor.

It sometimes happens, however, that a pledgee will try to work both ends against the middle, that is to say, will try to transfer the pledged chattels without the debt, retaining the right to collect the latter,⁷² and vice versa. In the first of these instances, it is normally held that the transferee obtains nothing by the transaction because, as the only justification for a pledge is to serve as security for a debt, it must follow that an attempt to separate the pledge from the debt would be to nullify the very reason for its being. As security, apart from the debt, can have no intrinsic value, hence be incapable of proper assignment, the attempt to assign would be a vain act, leaving the transferee with no rights.⁷³ A probable result of entering into a transaction of this type ought to be the destruction of the pledgee's security for, while the purported transfer has failed in its effect, it does serve to indicate that the pledgee either considered the lien unnecessary or undesirable. Such intent, when coupled with an actual giving

⁷¹ Brown, § 129; Restate., § 32. See *Nat. Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586 (1889).

⁷² *Rea v. Forrest*, 88 Ill. 275 (1878).

⁷³ It is to be observed that the principle here enunciated is usually stated in connection with attempts to transfer non-negotiable pledged chattels. The same principle is applicable where the pledged chattel is negotiable in character, except to the extent the transferee's rights would be protected by the interposition of the law regarding negotiable instruments. If, for example, the assignee has notice of the pledgor's rights, he may not claim as a holder in due course free of such equities: *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415 (1910); *Title & Trust Co. v. Brugger*, 196 Ill. 96, 63 N. E. 637 (1902); *Rice & Bullen Malting Co. v. Bank*, 185 Ill. 422, 56 N. E. 1062 (1900); *Mayo v. Moore*, 28 Ill. 428 (1862). By contrast, a bona fide purchaser would prevail despite the pledgee's conversion by the transfer: *Kessler v. Sherman*, 281 Ill. App. 448 (1935); *Cole v. Dalziel*, 13 Ill. App. 23 (1883). See also Restate., § 29(3).

up of possession of the pledged property, ought to be sufficient to end the security interest, particularly at the hands of one who, having abandoned his interest, ought not be heard to claim a continuation of his right when his own breach of duty to the pledgor has proved to be ineffective to vest rights in others.

By way of contrast, the pledgee may have assigned the secured debt but may have continued to retain the pledged property. The immediate question then becomes one as to whether the assignment of the debt carries with it an assignment of the pledge. If so, that right could exist only in equity for there would be no actual transfer of that possession which is a requisite to the creation of a legal interest in pledge transactions. A subordinate question would also arise as to whether or not the pledgee intended to transfer both the debt and the security or only the debt. As there would generally be no reason for assuming that the assignee, as a result of the transfer of the debt, was to be given only limited rights with respect to its collection, equity would usually treat the pledgee as a constructive trustee over the pledged chattels left in his possession for the benefit of the assignee of the debt, barring an agreement to the contrary.⁷⁴ Under such circumstances, if the pledged chattels were non-negotiable, a subsequent assignment of them, even to a bona fide purchaser, would be ineffective. It would be possible, however, for

⁷⁴ Brown, § 129; Restate., § 29. See also Restate., Restitution, § 160, and note in 25 Va. L. Rev. 375 (1939). In *Kessler v. Sherman*, 281 Ill. App. 148 (1935), the assignee of a negotiable pledge was allowed to recover the full value of the secured debt, to-wit: \$6610, although he had paid only \$1800 for the transfer. Sundry ramifications could also develop in the event the pledgee assigned the debt to one and the pledged chattel to another. Clearly, the pledgor ought to be able to re-obtain his property on payment of the debt and should not be compelled to pay twice. If the principal debt and the pledged chattels were both non-negotiable, it would seem that the first assignee in point of time ought to prevail as each would have an equitable interest and the first equity in time is normally held to be paramount. If the debt was non-negotiable but the pledge was evidenced by a negotiable instrument, it would seem that the pledgor might be liable to both assignees, if holders in due course, to the extent each had advanced value, leaving the pledgor to seek satisfaction from the pledgee for any injury sustained thereby. Had the assignments been reversed in time, the holder in due course of the pledge, having a legal interest, would probably prevail over the equity of the assignee of the debt. In case the debt was negotiable and the pledge non-negotiable, the holder in due course of the negotiable paper would unquestionably prevail, regardless of the sequence of the assignments. If both debt and pledged chattel were negotiable, both assignees would appear to be able to insist on their rights as holders in due course.

the pledgee, after assignment of the debt, to return the pledged goods to the pledgor, who might take without knowledge of the assignment. In that instance, the pledge would be terminated, particularly so if the pledgor had paid value for the return, had sold the goods to a bona fide purchaser, or had so altered his position in reliance on the apparent state of things that it would be inequitable to enforce the pledge against him. It should be understood that, in a case where the pledged chattel was negotiable in form, the usual rules of negotiability would apply.

IV. RIGHTS AND DUTIES OF PARTIES AT MATURITY

A. PLEDGOR'S RIGHTS AND DUTIES

Upon arrival of the maturity date, the pledgor is under a duty to take whatever steps would be necessary to discharge the secured debt as well as to do all other acts which may be incidental to the agreement. Having fully performed, the pledgor would have the right to expect the pledgee to return the pledged property and it is unquestioned law that such a duty exists.¹ It is important, however, to give some consideration to the reason for imposing this duty on the pledgee, for the reason chosen may have considerable bearing on the rights and remedies of the pledgor in the event of a breach by the pledgee or his assignee. A contract to pledge is not a bilateral one, involving a promise to pay the debt in consideration for a promise to return the pledged chattels.² Because there is an obligation to return the pledged goods,

¹ *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939); *Till v. Material Service Corp.*, 288 Ill. App. 103, 5 N. E. (2d) 747 (1937); *Adams v. Struges*, 55 Ill. 468 (1870); *Painter v. Merchants & Manufacturers Bank*, 277 Ill. App. 208 (1934); *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926); *Midland Co. v. Huchberger*, 46 Ill. App. 518 (1892).

² A discussion to the contrary may be found in Parks, "The Rights of a Pledgor on Transfers of a Pledge," 6 Minn. L. Rev. 173 (1922), but see also a mildly impassioned rebuttal in Farnham, "Effect of Pledgee's Breach of Duty on Existence of the Debt," 35 Mich. L. Rev. 253 (1936). A penetrating analysis appears in Williston, "Contractual Relations Between Pledgor and Pledgee," 55 Harv. L. Rev. 713 (1942). See also Brown, § 131. Professor Parks' conclusions seem to arise from a desire to penalize the breach of a "moral obligation" which he believes is inherent in the pledge transaction, but this hardly constitutes an accurate analysis. Whether obligations are conditional can be determined only by noting what the contract calls for, not by examination of the remedies afforded to an innocent party upon a breach of the contract.

it is understandable why, at first blush, the presence of that obligation might be said to support an inference that the duty to pay the debt is conditioned on the duty to return the security res, so as to make performance of both duties mutual and dependent.

It is unquestionable, however, that the pledgee's duty to return the pledged chattels is conditioned only on his receipt of payment. The very fact that an object is held as security for a debt necessarily dictates the implication that the debt must be satisfied prior to, or simultaneously with, the return of the security res for the converse would rarely be found expressed in a pledge agreement and would not arise by implication. At the initiation of the pledge agreement, the consideration given for the pledgor's promise of ultimate performance is the pledgee's present advance of credit. The fact that security is given is an important inducement for the pledgee to enter into the contract but it is, after all, merely collateral to the then current exchange of promises, to advance credit on the one hand and to respond by some future performance on the other. Clearly, therefore, the obligation to return the pledged chattels is ancillary to payment and arises only by implication of law.

If, on the other hand, the pledgor does not perform as required by his contract, the pledgee, absent any agreement to the contrary, may thereupon elect his course of action. He could, as noted hereafter, (1) sue on the principal debt, (2) seek to foreclose on the pledge interest, or (3) offer the pledged chattels for sale. The presence of security in the form of a pledge does not preclude him from electing to pursue his remedy on the debt nor force him to look first to the pledged chattels.³ In that respect, the cases do not show any inclination to require that a pledgee, as a condition to suit on the debt, should show that he has tendered the return of the security res, which fact may further buttress the conclusion that the obligation to return the security is not one of mutual or dependent character.

³ *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624 (1893); *Archibald v. Argall*, 53 Ill. 307 (1870); *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551 (1868); *Pyle v. Crebs*, 112 Ill. App. 480 (1903).

What has been said applies equally to cases where the debt has, in fact, been paid and those where the pledgor has merely made a tender. If the pledgor should make an unconditional and appropriate tender of the amount of the secured debt, the pledgee should accept it as a refusal to do so would be adequate ground for terminating the secured relationship. The pledge being thereby terminated, the pledgor would then be in position to demand a recovery of his property.⁴ It follows, from that fact, that the pledgee would then be disabled from conveying an effective interest in the pledged chattels, even to a bona fide purchaser, except where the negotiable instruments law might operate to control the rights of the parties to the transaction.⁵

The nature of a proper tender, where no question as to its being conditional can arise, may be a proper subject for inquiry. The least that would be required for a tender would be the amount of the secured debt plus all necessary expenses, if any, which the pledgee may have incurred. A demand for a tender of any greater amount may work a conversion, but the mere assertion that the pledged chattels are held as security for more than the value of the secured debt will not excuse a failure to tender,⁶ for tender will be excused only where it would prove to be a vain and useless act.⁷ In the event of an assignment or repledge of the debt and its security, the pledgor would have to make tender to the assignee, provided the pledgor has been apprised of the assignment in timely fashion.⁸ If, however, the pledgor has paid the pledgee in good faith prior to notice of assignment, all payments so made will be credited on the secured debt, leaving it to

⁴ *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939); *Eldred v. Colvin*, 206 Ill. App. 2 (1917); *Schwartz v. Chicago State Pawnors Society*, 195 Ill. App. 93 (1915). It should be observed that the pledgee has an absolute duty to return the pledged chattels after he has been tendered full payment and has no right to question the pledgor's title, having recognized that title through the pledge agreement. If the pledgee should fear suit by a paramount title holder, he ought to interplead such claimant and the pledgor in equity: *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926).

⁵ *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926).

⁶ *Henry v. Eddy*, 34 Ill. 508 (1864).

⁷ *Hughes v. Barrell*, 167 Ill. App. 100 (1912).

⁸ *Bradley v. Parks*, 83 Ill. 169 (1876); *Bowles v. Seymour*, 184 Ill. App. 240 (1913).

the assignee and the pledgee to settle their differences as best they may. It may be difficult to conceive how such a problem could arise in practical affairs for, when the pledgor tenders, he normally requests a return of the pledged chattels. If the same are not forthcoming, the pledgor ought to inquire as to the status of the claim and, having been put on inquiry, would make further payments to the pledgee at his peril.⁹

A refusal to respond to a tender, while it may end the pledge relationship, does not discharge the debt.¹⁰ In that regard, the cases have determined with unanimity that the debt will survive any breach of the pledgee's duty with respect to the pledged chattels, whether in the form of a wrongful sale,¹¹ a wrongful repledge,¹² a refusal to surrender on tender,¹³ an inability of the pledgee to make a redelivery,¹⁴ or a destruction of the pledged property.¹⁵ In that connection, it may be observed that it is of no moment whether the action arising because of the differences occasioned by the pledgee's acts is one brought by the pledgor¹⁶ or by the pledgee,¹⁷ but it must not be implied that the pledgee will be denied restitution. To the contrary, an adjustment may

⁹ *Mayo v. Moore*, 28 Ill. 428 (1862); *Vanlieu v. Second National Bank of Galesburg*, 21 Ill. App. 126 (1886).

¹⁰ The complementary rule is that if a tender is not made the pledgor has no right to a return of the pledged chattels; *Bradley v. Parks*, 83 Ill. 169 (1876); *Henry v. Eddy*, 34 Ill. 508 (1864); *Bowles v. Seymour*, 184 Ill. App. 240 (1913); *Edwin v. Jacobson*, 47 Ill. App. 93 (1893).

¹¹ *Knight v. Seney*, 290 Ill. 11, 124 N. E. 813 (1919); *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886); *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879); *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548 (1876); *Belden v. Perkins*, 78 Ill. 449 (1875); *Loomis v. Stave*, 72 Ill. 623 (1874); *Hughes v. Barrell*, 167 Ill. App. 100 (1912).

¹² *Knight v. Seney*, 290 Ill. 11, 124 N. E. 813 (1919); *Bradley v. Parks*, 83 Ill. 169 (1876).

¹³ *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939); *Nat. Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586 (1889); *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926); *Eldred v. Colvin*, 206 Ill. App. 2 (1917); *Schwartz v. Chicago State Pawniers Society*, 195 Ill. App. 93 (1915); *Schwartz v. Kaufman*, 159 Ill. App. 503 (1911); *Powell v. Ong*, 92 Ill. App. 95 (1900).

¹⁴ *Jacobs v. Grossman*, 310 Ill. 247, 141 N. E. 714 (1923); *Union Nat. Bank v. Post*, 192 Ill. 385, 61 N. E. 507 (1901); *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. 976 (1896).

¹⁵ *Till v. Material Service Corp.*, 288 Ill. App. 103, 5 N. E. (2d) 747 (1937).

¹⁶ *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939).

¹⁷ *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548 (1876); *Chi. Art. Well Co. v. Corey*, 60 Ill. 73 (1871).

be had by way of set-off, recoupment, or counterclaim if the action is brought by the pledgee, or the measure of damages may be adjusted where the pledgor sues as in *assumpsit* or *trover*, for any decision to the contrary would be inconsistent with reason and justice.¹⁸

In support of that conclusion, it could be urged that, as the giving of security is merely incidental to the agreement to advance credit, the pledgee's breach of duty regarding the pledged chattels should not place a bar to his recovery on the debt for the pledgor, by receipt and use of the credit, has already gained the substantial benefit to be derived from his bargain. The pledgee's inability to perform his ancillary contract should, then, have little or no bearing on the pledgor's duty to perform his part of the principal contract. In addition, to excuse the pledgor from discharging the debt merely because the pledgee turns out to be unable to return the pledged chattel would be to impose a most unjust and inequitable penalty on the pledgee while giving the pledgor an entirely unwarranted windfall, particularly so if the value of the unreturned pledged chattel should be but a fractional part of the amount of the indebtedness. For that matter, as most pledged chattels are readily marketable and possess an ascertainable value, it would be most unfair to refuse the pledgee the right to recover on his debt on some fancied theory that damages would not adequately compensate the pledgor for the loss of his property. The existence of an occasional case in which

¹⁸ There is authority in some jurisdictions to the effect that a different rule ought to prevail in stock-brokerage transactions on the theory that, if the stockbroker is guilty of an act inconsistent with his duties, the customer may repudiate the transaction and demand the return of his margin, with no obligation on the customer's part to take or pay for the stock bought for his account. See *Larminie v. Curley*, 114 Ill. 196, 29 N. E. 382 (1885); *Denton v. Jackson*, 106 Ill. 433 (1883); *Oldershaw v. Knowles*, 101 Ill. 117 (1881); *Jones v. Marks*, 40 Ill. 313 (1866). If the relationship between the customer and the broker was merely one in agency, the rationale would be correct, but, unfortunately for decisions of this type, it is a well accepted doctrine that a stockbroker who has executed a customer's margin order is a pledgee: *Meyer, The Law of Stockbrokers and Stock Exchanges* (Baker, Voorhis & Co., New York, 1931), § 41. The Illinois cases cited are apparently no longer law for, in *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886), whether in recognition of the true status of the relationship or for some other reason, the court held that the customer, in an action to recover his margin, could recover only the difference between the amount thereof and his debt to the broker. See also the Appellate Court decision in *Hughes v. Barrell*, 167 Ill. App. 100 (1912).

the pledge covered unique property, so that an allowance of damages would be inadequate to satisfy the pledgor, should be insufficient reason for the invocation of a general rule, applicable to all pledge transactions, designed to deny recovery on the debt.

By and large, the cases have failed to answer what could prove to be a most serious difficulty with respect to tender, *i. e.*, may a pledgor condition his tender on the return of the pledged property? The issue has seldom been litigated, probably because the pledgor feels so confident that the pledged chattels will be returned that it does not occur to him to suggest such a condition or, if he suggests the condition, the pledgee is usually able and happy to oblige. Only from a negative approach then, could it be said that, as a conditional tender would not be a good defense, it could likewise afford no basis for a cause of action. The issue can and does arise, although the authority on the point is sketchy indeed¹⁹ and leads to the only reasonable inference to be gained and that is that the pledgor is absolutely obligated to pay the debt secured whether or not the pledged chattels are returned to him. Such being the case, if the pledgor must first pay the secured debt and only then be able to demand a return of his pledged property, the pledgor may be put to unreasonable expense, delay, and inconvenience.

The thought then occurs that it might be advisable, in such cases, to adopt the general procedure ordinarily used where a pledgee has converted the pledged chattels, to-wit: allow the value of the chattels to be set-off against the value of the debt, with an accounting for any surplus to the pledgor or pledgee as the case may be. The suggestion, however, would be incompatible with pledge theory for the pledgee would merely be insisting on his rights and the pledgor would be trying to improve his lot by a conditional tender. As the pledgee has a right to hold the security until the debt, or any judgment into which the debt has

¹⁹ There is only one case on the point in Illinois, that of *Schwartz v. Kaufman*, 159 Ill. App. 503 (1911). It well illustrates the difficulty the pledgor might face in case the pledgee should be disinclined to return the pledged chattels, particularly where the pledgee is a non-resident. For an authoritative discussion of this issue, see Williston, "Contractual Relations Between Pledgor and Pledgee," 55 Harv. L. Rev. 713 (1942).

merged, has been satisfied, the allowance of a set-off would destroy the security which the pledgee may wish to assert in those instances where his recovery from the pledgor might leave a deficiency on the secured debt.²⁰

A more satisfactory solution would appear to be one under which the pledgor, whether he is suing or being sued, should be permitted to pay the secured debt into court. If able to make a conditional tender, he has on hand a sum sufficient to discharge the secured debt and could, without hardship, make the necessary deposit, thereby evidencing his good faith and ability to perform on the one hand while assuring full performance to the pledgee on the other. The court could then decree that, at such time as the pledgee surrendered the pledged chattels to the pledgor, or into court, the pledgee would then be entitled to obtain the money so deposited or, in the alternative, if unable or unwilling to respond to the decree within a limited time, should submit to an equitable set-off with an accounting. The suggestion naturally presupposes the existence of some type of equitable proceeding,²¹ but one illustration will serve to establish the desirability of such a proceeding. If the pledged chattel should consist of negotiable paper, the pledgee could cause the pledgor considerable harm by its negotiation. Unless, then, the pledgor is assured that the pledgee can and will return such paper upon payment of the debt, the pledgor ought to have some assurance that a return will be forthcoming coincidental with his performance.

Independent of what has been said, it is possible that the pledgee may have done some act which would constitute a conversion of the pledged chattels.²² If so, several problems call for

²⁰ If the pledge possessed a fluctuating value, it would be unfair to compel a sale or evaluation, either at the time of the debt or at the initiation of the action, where the pledgee has done no wrong. Furthermore, there would be some doubt as to whether or not the judgment, in an action in which a set-off is allowed, would make the pledgee the owner of the pledged chattels. Even if this presented no problem, the chances are that a borrower would be unhappy to think he would have no way to secure the return of his chattels, a matter which might be of paramount importance to him.

²¹ Brown, § 131; Restate., §§ 46 and 57.

²² For a partial list of cases illustrating sundry acts of conversion, see cases listed in this division, notes 11-5, ante.

resolution. No one would doubt that the pledgor ought to be given restitution for the injury done him by the pledgee's act. The desire, however, should be to make the pledgor whole without mulcting the pledgee and to achieve this without the necessity of resorting to more than one cause of action. If there are difficulties, they arise from the attempt to achieve this obviously equitable solution without warping technical rules of pleading. In the event the pledgor should sue, as for conversion, the rule is that the pledgor will receive the value of his chattels less the debt due,²³ for he would be seeking to obtain restitution for the destruction of his property interest and the extent thereof is no greater than the difference between full value and the outstanding debt. Such a judgment would, equitably, dispose of all issues. A similar analysis would be available in case the pledgor should sue, as in assumpsit for money had and received, following a sale by the pledgee of the pledged chattels. It is reasonable to say that, when the pledgee sells, the sale ought to be for the pledgor's benefit so that any amount in excess of the debt derived from the sale should equitably belong to the latter. Even though the sale be tortious, the pledgee would not be allowed to allege that the sale was for his benefit, hence one suit would again be sufficient. If the pledgor does not choose to assume the initiative and waits until the pledgee-converter sues on the secured debt, there is not the least doubt that the pledgor may, if he wishes, have a set-off against such claim to the extent he has sustained injury by reason of the pledgee's tortious act²⁴ for, while the giving of security and the loan transaction are distinct, they are so closely related that it would seem proper to allow the set-off to obviate the neces-

²³ *Jacobs v. Grossman*, 310 Ill. 207, 141 N. E. 714 (1923); *Union Nat. Bank v. Post*, 192 Ill. 385, 61 N. E. 507 (1901); *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. 976 (1896); *Nat. Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586 (1889); *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886); *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879); *Belden v. Perkins*, 78 Ill. 449 (1875); *Loomis v. Stave*, 72 Ill. 623 (1874); *Chapin v. Tampoorlos*, 325 Ill. App. 219, 59 N. E. (2d) 545 (1945); *Till v. Material Service Corp.*, 288 Ill. App. 103, 5 N. E. (2d) 747 (1937); *Youngquist v. Hunter*, 227 Ill. App. 152 (1922); *Schwartz v. Chicago State Pawnners Society*, 195 Ill. App. 93 (1915); *Hughes v. Barrell*, 167 Ill. App. 100 (1912); *Powell v. Ong*, 92 Ill. App. 95 (1900); *Cole v. Dalziel*, 13 Ill. App. 23 (1883); *Killian v. Hoffman*, 6 Ill. App. 200 (1880).

²⁴ *Zimbleman v. Veeder*, 98 Ill. 613 (1881); *Joliet Iron & Steel Co v. Scioto Fire Brick Co.*, 82 Ill. 548 (1876). See also *Rea v. Forrest*, 88 Ill. 275 (1878).

sity for additional litigation. If, however, the pledgor should chose to recover the chattels in specie, as by replevin, he would have to make a proper tender.²⁵

It having thus been satisfactorily established that the tortious acts of the pledgee, when dealing with the pledged chattels, will not operate to destroy the debt, the query then becomes one as to whether the same thing can be said as to the pledgee's interest in the security res. If that query is answered in the affirmative, it would logically follow that a pledgor could not sue in trover without first having made a tender of the performance due on his part under the contract to pledge. As trover is normally maintainable only where the moving party has a present right to possession, a pledgor would normally have such right only after a tender of full performance. This is the English view,²⁶ and there is some authority for this attitude in this country,²⁷ but the rule is an arbitrary one, resting on a mere technicality, hence has generally been rejected here. The suggestion has been made that the reason for rejecting the English rule lies in the fact that the pledgee, having breached his implied promise to return the pledged property, can no longer call on the pledgor to perform. This suggestion is without merit if it is true that the giving of the security is merely ancillary to the contract to give credit. Other cases have suggested that, since the pledgee's tortious act would have disabled him from performing if the debt were tendered, a tender would be regarded as unnecessary because the law does not require one to do a useless and vain act.²⁸ This suggestion, too, will not bear up under full analysis. Suppose, for example, the tortious act has not put it out of the pledgee's actual power to return the pledged chattels. Would a tender then be excused?

²⁵ *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939); *Bradley v. Parks*, 83 Ill. 169 (1876); *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926); *Eldred v. Colvin*, 206 Ill. App. 2 (1917); *Schwartz v. Kaufman*, 159 Ill. App. 503 (1911); *Sell v. Ward*, 81 Ill. App. 675 (1898).

²⁶ *Halliday v. Holgate*, L. R. 3 Exch. 299 (1868); *Donald v. Suckling*, L. R. 1 Q. B. 585 (1866).

²⁷ See *Parks*, "The Rights of a Pledgor on Transfer of a Pledge," 6 Minn. L. Rev. 173 (1922).

²⁸ *Hughes v. Barrell*, 167 Ill. App. 100 (1912).

Apparently not,²⁹ for to allow the pledgor to immediately repossess his property could well leave the pledgee in a precarious position, perhaps without adequate means for collecting his just debt. The only satisfactory answer to the problem would seem to be one designed to ignore technical bars and determine that, as a matter of practical convenience and in order to avoid multiplicity of actions, the differences between the parties before the court were such that they could be settled in the action, whether or not a tender had been made.³⁰

In case the pledgee's tortious act consists of an illegal transfer to a third person, the pledgor might wish to pursue his rights against the transferee. Again, if the tortious act of the pledgee should operate to forfeit the pledge, the transferee of the pledged chattels would have no better right than the assignor had, so the pledgor could replevy or, in the alternative, hold the transferee liable in trover for the full value of such chattels. To permit this would be contrary to good sense for it would not only work an inequity on the transferee and grant the pledgor a windfall but would also encourage circuity of actions. To prevent such inequity, the transferee, provided he purchased the pledged chattels innocently and without knowledge of the pledgor's interest, should be treated as an assignee of the pledgee, entitled to the pledgee's rights on the secured obligation. It would not seem unwarranted to conclude that, by reason of the pledgee's purported transfer of a good title, he has impliedly assured to his transferee all the right, title, or interest he is capable of passing respecting the subject matter of the sale. Even though it is true that the pledgee cannot separate the security res from the debt, and if he did so would destroy the lien, that rule ought not prevail at

²⁹ *Chi. Art. Wells Co. v. Corey*, 60 Ill. 73 (1871); *Henry v. Eddy*, 34 Ill. 508 (1864); *Edwin v. Jacobson*, 47 Ill. App. 93 (1892).

³⁰ In *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939), *Jacobs v. Grossman*, 310 Ill. 247, 141 N. E. 714 (1923), *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886), and *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879), the right to sue was assumed without discussion of the need for a tender. In *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. 976 (1896), *Till v. Material Service Corp.*, 288 Ill. App. 103, 5 N. E. (2d) 747 (1937), *Painter v. Merchants & Manufacturers Bank*, 277 Ill. App. 208 (1934), *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926), and *Cole v. Dalziel*, 13 Ill. App. 23 (1883), the debt had been paid, hence a tender would have been unnecessary.

the expense of an innocent person so long as substantial justice may still be afforded to the pledgor. While it may be true that a transferee of the lien, without a transfer of the debt, would gain nothing thereby, it would seem not open to objection to hold that an innocent transferee of the lien ought to be able to assert that his purchase had operated to transfer all of the assignor's rights on the indebtedness to the transferee. If so, the transferee would then be able to allege that he was the assignee of the debt.³¹ The bona fide purchaser from the pledgee would not acquire an unfettered title but he could claim at least to the extent of the pledgee's interest, so as to require the pledgor to make a proper tender to the transferee.³² From the standpoint of syllogistic logic, a requirement that a pledgor, suing for conversion, would have to make a tender to the pledgee's assignee, but need not as to the pledgee, could not be reconciled, but the practical convenience of resolving all rights in one action, as well as the natural equities of the case, would make it seem just and reasonable to impose the requirement as a condition precedent in the one action if not in the other.³³

Despite this, it should be noted that, if the pledgee's transfer occurs after maturity, or if the pledgor, without notice of the assignment, satisfies the claim due the pledgee, the pledgor will have an unconditional right to demand a return of the pledged chattels, except insofar as negotiable instruments law would effect a contrary course.³⁴ If the transferee has acted innocently and

³¹ *Nat. Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586 (1889); *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Belden v. Perkins*, 78 Ill. 449 (1875); *Youngquist v. Hunter*, 227 Ill. App. 152 (1922). *Restate.*, § 23, takes the position that the assignee of the lien alone gets nothing, but that the pledgee is constructive trustee of the debt claim for the benefit of the assignee. See also *Restate.*, §§ 29 and 34.

³² *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415 (1910); *Bradley v. Parks*, 83 Ill. 169 (1876); *Bowles v. Seymour*, 184 Ill. App. 240 (1913).

³³ It should also be noted that, once the pledgor has made a tender which has been rejected by the pledgee, the pledgor is no longer required to keep the tender good and may proceed to his action without a new tender: *Cottrell v. Gerson*, 371 Ill. 174, 20 N. E. (2d) 74 (1939); *Chapin v. Tampoorios*, 325 Ill. App. 219, 59 N. E. (2d) 545 (1945); *Deane v. Fort Dearborn T. & S. Bank*, 241 Ill. App. 517 (1926); *Eldred v. Colvin*, 206 Ill. App. 2 (1917); *Schwartz v. Chicago State Pawnors Society*, 195 Ill. App. 93 (1915); *Schwartz v. Kaufman*, 159 Ill. App. 503 (1911).

³⁴ *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415 (1910); *Mayo v. Moore*, 28 Ill. 428 (1862); *Midland Co. v. Huchberger*, 46 Ill. App. 518 (1892).

has not, to that point, asserted a dominion over the chattels, the return thereof should operate to absolve him from any liability as a converter. Naturally, if the transferee has knowledge of the pledgee's tortious acts, his position would be no better than that of the pledgee under similar circumstances.³⁵

In those cases where the pledgor is suing to redress a conversion, two other problems will need some attention, to-wit: (1) what should be the measure of damage, and (2) as of what time should the damage be assessed? The usual measure of damage, in trover, being the market value of the pledge less the amount of the debt which remains unpaid, has generally been selected because it fixes the plaintiff's real loss while, at the same time, furnishing him with a sum sufficient to permit him to go into the open market and supply himself with a like article. There is no difficulty in applying this rule to tangible personal property available in a ready market.³⁶ With respect to the conversion of negotiable paper, except corporate stock, the rule is apparently the same although, *prima facie*, the measure of damage is the amount due on the negotiable instrument, less the sum of the debt it was given to secure.³⁷ In this instance, the pledgee may, if he is able, prove the pledged notes to be of some lesser value and thereby decrease his liability as a converter.³⁸ But, where the goods pledged, in no proper sense, can be said to possess a market value, considerable difficulty will arise in ascertaining their value. As to such property, value can be ascertained only from such proof as may be available, to the point where, if the article is exclusively or chiefly valuable to the owner alone, the true cri-

³⁵ Title & Trust Co. v. Brugger, 196 Ill. 96, 63 N. E. 637 (1902).

³⁶ Jacobs v. Grossman, 310 Ill. 247, 141 N. E. 714 (1923), a diamond ring; Belden v. Perkins, 78 Ill. 449 (1875), corn; Wadsworth v. Thompson, 8 Ill. 423 (1846), dry goods; Schwartz v. Chicago State Pawnors Society, 195 Ill. App. 93 (1915), diamonds; Schwartz v. Kaufman, 159 Ill. App. 503 (1911), sweaters.

³⁷ Union Trust Co. v. Rigdon, 93 Ill. 458 (1879); Joliet Iron & Steel Co. v. Scioto Fire Brick Co., 82 Ill. 548 (1876); Loomis v. Stave, 72 Ill. 623 (1874); Till v. Material Service Corp., 288 Ill. App. 103, 5 N. E. (2d) 747 (1937); Deane v. Fort Dearborn T. & S. Bank, 241 Ill. App. 517 (1926); Youngquist v. Hunter, 227 Ill. App. 152 (1922); Eldred v. Colvin, 206 Ill. App. 2 (1917); Powell v. Ong, 92 Ill. App. 95 (1900).

³⁸ In Powell v. Ong, 92 Ill. App. 95 (1900), for example, the pledgee established the insolvency of the maker of the notes deposited as collateral and thus decreased his liability.

terion of damage will be the actual value thereof to such owner. Thus, where a pledgor had pledged type plates which were valueless except to the owner of the business using the advertisement contained thereon, the damages for conversion were said to be the cost of replacing the plates.³⁹ So, too, as to a tailor-made suit, of little or no value except to the pledgor, for the conversion of which replacement value was allowed.⁴⁰ Damages of this nature, of course, are to be evaluated as of the time of the conversion.⁴¹

Where chattels which have been pledged are inclined to fluctuate in value, a different measure is substituted for the ordinary rule. The measure of the pledgor's damages for a conversion of his securities by a wrongful sale, for example, would be the difference between the highest market value of the securities within a reasonable time after the pledgor has knowledge or notice of the sale and the amount which was credited to the pledgor as a result of the sale.⁴² To limit recovery to the value of the stock at the time of the conversion would provide an inadequate remedy which would, in effect, give the pledgee control over the stock subject only to an obligation to pay nominal damages. Allowing the pledgor a reasonable time after notice of the conversion within which to act, on the other hand, would provide justice to pledgor and pledgee alike. The pledgor would have time to determine whether or not he cared to reinstate himself to the position he once occupied and, if he so desired, would have ample opportunity to accomplish his objective. By the same token, placing a limit on the time precludes the possibility that the pledgor may speculate at the pledgee's expense.

The reasonable time period should begin to run as soon as the pledgor learns of, or ought to have learned of, the conversion, regardless of how long after the tortious act this event may

³⁹ *Farson v. Gilbert*, 114 Ill. App. 17 (1904).

⁴⁰ *Sell v. Wood*, 81 Ill. App. 675 (1898).

⁴¹ Restate., § 24; McCormick, *Handbook on the Law of Damages* (West Publishing Co., St. Paul, 1935), § 123.

⁴² *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886); *Hughes v. Barrell*, 167 Ill. App. 100 (1912).

occur,⁴³ but the time period within which the measure of damages is to be fixed lies between the time of discovery of the conversion and a reasonable time thereafter, not the time between the conversion and a reasonable time after the discovery of the same.⁴⁴ No fixed time has been prescribed nor is there a rule of thumb available to fix the length of the reasonable time. In that connection, the pledgor should have time to consult with counsel, to seek the advice of brokers, to watch the market to determine the advisability of purchasing the same issue, and to raise the necessary funds. Of course, this does not mean that consideration should be given to the pledgor's financial ability or lack of it; it means merely that he should be given time within which to liquidate other property, if that should be necessary, in order to raise cash. Cases have held that, depending on these factors, a reasonable time could vary from two weeks to two months, but not longer. It might also be observed that, where the amount of damages proves to be no more nor less than the amount credited by the pledgee to the pledgor's indebtedness, the pledgor would be entitled to recover only nominal damages. If, on the other hand, the wrongful sale should bring in a price greater than the value obtainable in the intermediate period between discovery and a reasonable time thereafter, the pledgor would be entitled to seek damages based on the sale price, for any other holding would work to the profit of the converter.⁴⁵

⁴³ In *Mayer v. Monzo*, 221 N. Y. 442, 117 N. E. 948 (1917), the conversion was not discovered for a year.

⁴⁴ For example, if the conversion occurred on January 1st and the pledgor discovered the fact on March 1st, and supposing thirty days would be a reasonable time within which to replace the property, the damages would be fixed at the highest value between March 1st and April 1st, not between January 1st and April 1st.

⁴⁵ No special distinctions have been drawn in this article between the ordinary pledge transaction and the margin relationship existing between a customer and a stockbroker. For a complete and penetrating analysis of the peculiarities of pledge law found only in this relationship, see Meyer, *The Law of Stockbrokers and Stock Exchanges* (Baker, Voorhis & Co., New York, 1931), 1936 Supp. See also Black, *Stock Exchanges, Stockbrokers, and Customers* (West Publishing Co., St. Paul, 1940); Restate., §§ 12 and 41-5; Gilchrist, "Stockbroker's Bankruptcies; Problems Created by the Chandler Act," 24 Minn. L. Rev. 52 (1940); and note in 39 Col. L. Rev. 485.

B. PLEDGEE'S RIGHTS AND DUTIES

The obligations of the parties to a pledge agreement are, as has been noted, to some extent reciprocal. At maturity, the pledgor must pay or tender payment and the pledgee must return the pledged property. If the pledgor should default then, of course, the pledgee would be entitled to resort to whatever remedies the law allows to him in order to obtain satisfaction of his claim. Before resort may be had thereto, there may be instances where the issue of payment may be in dispute. For example, the pledgor may have given the pledgee a note with a new maturity date in exchange for the note evidencing the secured debt. It has been held, on numerous occasions, that the giving of one promissory note in lieu of another does not necessarily operate as a payment of the first note. In order to have that effect, delivery of the new note must have been so understood and intended by the parties.⁴⁶ This, of course, contemplates a complete understanding to that effect, as mere negotiations to substitute one note for another will constitute neither payment and discharge of the original note⁴⁷ nor an extension of the indebtedness.⁴⁸ In fact, the giving of a new note to evidence the secured debt merely raises a presumption that the new note represents no more than an extension of the maturity date of the secured debt, which presumption remains even where more than one note has been substituted.⁴⁹

The relationship of the parties to a pledge transaction is considerably changed, however, where the pledgor is only an accommodation party for the debtor. In the first instance, it has been held that, if the pledgee allows the pledgor to substitute one note for another, such substitution would constitute payment of the pledged note.⁵⁰ Obviously, if this is so, the pledged chattel has

⁴⁶ *Boulter v. Joliet Nat. Bank*, 295 Ill. 594, 129 N. E. 513 (1920); *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. 976 (1896); *Fairbanks v. Merchants' Nat. Bank*, 132 Ill. 120, 22 N. E. 524 (1889); *Price v. Dime Savings Bank*, 124 Ill. 317, 15 N. E. 754 (1888); *Loomis v. Stave*, 72 Ill. 623 (1874); *Archibald v. Argall*, 53 Ill. 307 (1870); *Wadsworth v. Thompson*, 8 Ill. 423 (1846); *Ross v. Skinner*, 107 Ill. App. 579 (1903).

⁴⁷ *Fairbanks v. Merchants' Nat. Bank*, 132 Ill. 120, 22 N. E. 524 (1889).

⁴⁸ *Loomis v. Stave*, 72 Ill. 623 (1874).

⁴⁹ *Ross v. Skinner*, 107 Ill. App. 579 (1903).

⁵⁰ *Union Nat. Bank v. Post*, 192 Ill. 385, 61 N. E. 507 (1901); *Post v. Union Nat. Bank*, 159 Ill. 421, 42 N. E. 976 (1896).

been liquidated so as to make the pledgee accountable to the debtor for any excess between the value of the liquidated pledge and the secured debt. At first blush, there would appear to be a logical inconsistency in holding that, if the pledgor-debtor substitutes one note for another as evidence of the debt, the secured debt is extended and the pledgee may continue to hold his pledge interest, but if a pledgor-surety should substitute one note for another already pledged, the substitution would act as a payment of the original note, thereby releasing the debtor at least *pro tanto*. When it is remembered that a pledgee may not sell or dispose of the pledged chattels, except in a manner consistent with the pledge agreement, it may be readily observed that the transfer under consideration would be a conversion. It is to be noted that, where the pledgor-debtor and the pledgee deal *vis-a-vis* respecting an extension, both of the interested parties have agreed to continuity of the lien. Where the pledgee agrees to a substitution by the pledgor-surety, he would be doing a voluntary act the consequence of which he knows, or ought to know, would terminate his right to hold the article originally delivered into his possession. That being true, regardless of the pledgee's mistaken innocence, the pledge will terminate and the debtor may then demand his rights, asserting them in an action by way of damages for conversion or, upon waiver of the tort, by suing for money had and received out of the sale made for his benefit.

Perhaps, in this connection, it ought to be noted that, when a third person pledges his property as security for payment of a debt or obligation of another, such property stands more nearly in the position of a surety for the debtor. Any unapproved change in the contract such as would discharge a surety would be likely to operate so as to release and discharge the property so held in pledge. It is well settled, therefore, that if a pledgee, by a valid and binding agreement, and without the assent of the pledgor-surety, should give further time for payment by the principal debtor, the pledge will be terminated.⁵¹ It has been suggested that,

⁵¹ *Boulter v. Joliet Nat. Bank*, 295 Ill. 594, 129 N. E. 513 (1920); *Price v. Dime Savings Bank*, 124 Ill. 317, 15 N. E. 754 (1888); *Towler v. Mt. Carmel Trust & Savings Bank*, 206 Ill. App. 427 (1917); *Restate.*, § 36. It would be well to con-

provided the loan was initially made to the principal debtor for the benefit of the pledgor-surety, the latter should not be released by an extension,⁵² and that, in any event, the pledgor-surety should only be released by the unapproved extension, in those instances where he could show the agreement caused an actual loss. Whether this be good law or not, pledgees should exercise considerable caution when approached respecting an extension of the secured debt.

In the event of an unquestionable default by the pledgor at maturity, the pledgee may resort to either of three remedies available to him. He may (1) seek a recovery by proceeding directly on the debt itself; (2) seek an equitable foreclosure of the pledge; or (3) may sell the pledged chattels without judicial intervention. The mere acceptance of security, on default, does not work a discharge of an existing debt, barring an agreement to the contrary,⁵³ hence it follows that the fact that a creditor is holding security provides no reason to require, or even to imply, that he must first enforce collection from the collateral before seeking to prosecute his claim on the principal debt, again barring an agreement to the contrary.⁵⁴ In fact, even where a creditor has more than one source of security, he may insist not only on all those rights which the presence of security provides but also on his debt claim.⁵⁵ He is not, for that matter, obliged to make an election but may simultaneously pursue whatever actions, either at law or in equity, which may be warranted by the presence of the principal and

trast this result with that attained in *Foltz v. Harden*, 139 Ill. 405, 28 N. E. 786 (1891). In that case, both A and B were jointly liable on a note to C. A gave C the added security of a mortgage on real estate. Upon default on the note, C foreclosed on the real estate, bought in at the foreclosure sale, and later compromised with A for a release of the right to redeem, thereby discharging the secured debt to that extent. C then sued B on the debt. It was held that, since B was jointly liable on the note and was not just a surety, A's bargain with C, absent any fraud, was a valid one which in no way affected B's liability on the secured debt.

⁵² *Towler v. Mt. Carmel Trust & Savings Bank*, 206 Ill. App. 427 (1917), particularly p. 433.

⁵³ *Wilhelm v. Schmidt*, 84 Ill. 183 (1876).

⁵⁴ *Archibald v. Argall*, 53 Ill. 307 (1870); *Pyle v. Crebs*, 112 Ill. App. 480 (1903).

⁵⁵ *Steingrebe v. French Mirror & Glass Beveling Co.*, 83 Ill. App. 587 (1898).

collateral obligations inherent in the pledge agreement.⁵⁶ He may not, of course, prosecute inconsistent causes of action simultaneously nor receive more than one satisfaction for his claim, but the fact that he has been authorized to sell the pledged chattel and apply the proceeds toward the discharge of the debt in no way hinders him in his right to sue on the secured debt.⁵⁷

A subsidiary question may arise as to whether a pledgee, holding a secured claim against an insolvent debtor, may file and prove his claim in full in the insolvency proceeding or whether he must first realize on the security and then file a claim only for the deficit, if any. The pledgee has been permitted to establish his claim in full because of his double right to sue personally on the debt and, if necessary, to realize on the security, provided the whole amount of the claim is due at the time of filing. If the pledgee should have realized upon his security before the filing of the claim, he would, by reason thereof, have voluntarily parted with his secured position, so he would then be limited to claim only the amount actually due him, that is the amount of the debt less the value received from enforcing the security.⁵⁸ Naturally, since the pledged chattel would not become part of the insolvent's available assets until after the pledge lien had been discharged, other creditors of the pledgor could take no advantage thereof until that time,⁵⁹ but that are entitled to insist that the total of any dividend from the insolvent estate, when added to any amount realized from the pledged property, should not exceed the total sum of the secured debt.⁶⁰ It should also be noted that, if the pledged chattel should be in the form of a chose in action against a third person, such third person would be denied the right to set-off a

⁵⁶ *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624 (1893); *Pyle v. Crebs*, 112 Ill. App. 480 (1903).

⁵⁷ *Corn Belt Bank v. Forman*, 264 Ill. App. 589 (1932).

⁵⁸ *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624 (1893); *Merchants & F. State Bank v. Sheridan*, 156 Ill. App. 25 (1910).

⁵⁹ But see discussion above, 31 *CHICAGO-KENT LAW REVIEW* 99-140, particularly pp. 125-7.

⁶⁰ For a more extended discussion of this problem see McGinnis, "Sale of Collateral Security by the Pledgee Thereof After the Intervention of the Bankruptcy of the Pledgor," 9 Ind. L. J. 195 (1934). See also note in 17 Va. L. Rev. 508.

claim due him from the insolvent pledgor, he being obliged to respond to the pledgee in full on the chose and being remitted to his own claim against the insolvent.⁶¹

The right of the pledgee to seek satisfaction of his claim by a foreclosure and judicial sale, or by a non-judicial sale, of the pledged chattels would not be lost merely because the pledgee may have been seen fit to obtain a judgment on the debt, or because a statute of limitation may have interposed a bar to his remedy on the debt. A decree or judgment based on a secured debt produces no more than a merger of the debt in the decree or judgment; it does not constitute payment unless the decree or judgment has been satisfied.⁶² Of course, if such a decree or judgment becomes satisfied, the pledgee or his assignee would then be obliged to return the pledged chattel or be exposed to liability as a converter.⁶³ In much the same way, the running of a statute of limitation on the original debt, or on a decree or judgment based thereon, would not be payment of the indebtedness,⁶⁴ hence the pledgee might continue to hold the security res until the indebtedness was paid according to its terms, or might seek to realize on the pledge itself. If the proceeds of the pledge proved to be more than sufficient to satisfy the debt, the pledgee would be obliged to account for any surplus, but would not be permitted to hold the pledgor liable for any deficiency as the promise to pay the debt would have been rendered inoperative by the lapse of time.

Even if no judgment had been obtained on the debt itself, the right to sell the pledge would not be lost because of the running of the statute of limitation on the debt⁶⁵ any more than such

⁶¹ *Great Northern Laundry Co. v. Commercial Credit Co.*, 282 Ill. App. 334 (1935).

⁶² *Stombaugh v. Morey*, 388 Ill. 392, 58 N. E. (2d) 545, 157 A. L. R. 254 (1945); *Jenkins v. International Bank*, 111 Ill. 462 (1884); *Rea v. Forrest*, 88 Ill. 275 (1878).

⁶³ *Stombaugh v. Morey*, 388 Ill. 392, 58 N. E. (2d) 545, 157 A. L. R. 254 (1945); *Rea v. Forrest*, 88 Ill. 275 (1878).

⁶⁴ *Jenkins v. International Bank*, 111 Ill. 462 (1884).

⁶⁵ *Reconstruction Finance Corp. v. Lucius*, 320 Ill. 57, 49 N. E. (2d) 852 (1943). See also *Dorsey v. Reconstruction Finance Co.*, 197 F. (2d) 468 (1952), affirming 96 F. Supp. 31 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 89.

right would be affected by the pledgor's insolvency⁶⁶ or bankruptcy.⁶⁷ The reason for this would appear to lie in the construction to be given to a pledge agreement for, even if all right on the secured debt should be barred, the pledgee would retain an interest in the pledged chattel equivalent to that which a pledgee would have obtained if there had been no personal liability on the pledgor's part from the outset. While there may be occasion to believe that the right to sell the pledged property could be lost by abandonment, waiver, or laches, the right of either pledgor or pledgee to assert their respective interests in the pledged property would not be denied by a court on the ground it had been so lost, at least as long as both pledgor and pledgee have continued to recognize the existence of the pledge agreement.⁶⁸

The pledgee, of course, is not obliged to resort first to his remedy on the debt. He may seek to enforce the pledge. His right in that respect is of a nature which an equity court would have jurisdiction to entertain in an action to foreclose the pledge by a judicial sale⁶⁹ and there would be no reason to deny a petition to that effect on the ground the pledgee had an adequate remedy at law, by way of suit on the debt against a solvent pledgor, or because, by the agreement, he had been authorized to sell the pledged chattels without the need for judicial intervention. The logic of so holding would seem unassailable. The right of the pledgee to an election to pursue the debt or to look to the pledge is implicit in the pledge contract and it would be up to the pledgor, as by paying the debt, to protect his interest in the chattel. Barring an agreement to the contrary, it would be inequitable to hold that the pledgee would have to demonstrate lack of success in his attempt to collect on the debt before per-

⁶⁶ *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624 (1893); *Merchants & F. State Bank v. Sheridan*, 156 Ill. App. 25 (1910).

⁶⁷ *Merchants & F. State Bank v. Sheridan*, 156 Ill. App. 25 (1910). See also *Restate.*, § 47.

⁶⁸ *Daly v. Spiller*, 222 Ill. 421, 78 N. E. 782 (1906).

⁶⁹ *Stombaugh v. Morey*, 388 Ill. 392, 58 N. E. (2d) 545, 157 A. L. R. 254 (1945); *Foltz v. Harden*, 139 Ill. 405, 28 N. E. 786 (1891); *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Riddle v. Todd*, 306 Ill. App. 252, 28 N. E. (2d) 326 (1940); *Merchants & F. State Bank v. Sheridan*, 156 Ill. App. 25 (1910). See also *Brown*, § 132; *Restate.*, § 48.

mitting him to resort to the security. In addition, there may be reasons why it would be desirable to seek a foreclosure in equity. For example, if the pledgor should dispute the amount due on the secured debt, particularly where the pledgor is merely an accommodation party for another, a judicial decision as to the relative rights of the parties would seem most proper. The same thing would be true if other persons should seek to assert claims allegedly superior to those of the pledgee.⁷⁰ In these instances, the decree ordering the sale would not only resolve the rights of the parties but would also make it possible to sell an unencumbered title, thereby encouraging the greatest possible return from the sale. A judicial foreclosure would also be feasible where the pledgor is not to be found in the jurisdiction, so that proper demand or adequate notice of sale cannot be given, in order to protect the pledgee from a subsequent claim of abuse of duty.

The decree directing foreclosure could be so drawn as to resolve the rights of the parties thereto, not only by determining the quantum of the debt and by ordering a sale of the pledged chattels but also by directing the application of the proceeds of sale. In that respect, the funds realized would first be used to discharge the costs and expenses of the sale; second, be applied on the secured indebtedness; third, be used to satisfy junior liens, if any; and lastly, in case a surplus existed, such surplus would be returned to the pledgor. In the event of a deficiency between the amount realized on the sale and the amount due on the debt, the court, at the time of confirming the sale, could enter a deficiency judgment, provided it has personal jurisdiction over the necessary parties, but the pledgee is not required to seek a deficiency judgment and a foreclosure could be conducted without such a request. In the event of foreclosure, however, the decree should never be for more than the amount of the debt secured by the pledge.⁷¹

If the pledgee should so choose, he could avoid some of the

⁷⁰ *Merchants & F. State Bank v. Sheridan*, 156 Ill. App. 25 (1910).

⁷¹ *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415 (1910); *Jenkins v. International Bank*, 111 Ill. 462 (1884); *Zimpleman v. Veeder*, 98 Ill. 613 (1881).

difficulties inherent in actions on the debt, or in an attempt to secure judicial foreclosure of the pledge, by exercising his right to sell the pledged property at his own sale. Contrary to the common law respecting the rights of an ordinary lienor, the pledgee has the right to enforce his pledge lien by sale, even though the sale would be surrounded by sundry restrictions.⁷² Upon full compliance therewith, the pledgee, acting as agent for the pledgor under a power coupled with an interest, would be able to sell free of the pledgor's interest and could apply the proceeds from the sale toward the satisfaction of the expense of the sale, then toward the discharge of the debt itself, retaining the balance, if any, for the pledgor. Such a sale, held without court authorization or supervision, would have to be conducted in a manner which would assure maximum protection to the debtor in order to prevent a forfeiture, to secure a maximum price, and to provide an accounting for the surplus, if any. A failure to observe any of the ordinary precautions in these respects would be sufficient to avoid the sale and would expose the pledgee to liability for a conversion.

Obviously, no such sale should be had until the pledgor is in default and it is doubtful, even in the face of a provision in the pledge contract to the contrary, that a court would uphold a sale made prior to a default.⁷³ If, therefore, some act other than mere non-payment, as for example a demand, would be necessary to put the pledgor in default, that act would have to be performed before a sale could be had. In some instances, the pledgee would

⁷² *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415 (1910); *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879); *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548 (1876); *Belden v. Perkins*, 78 Ill. 449 (1875); *Loomis v. Stave*, 72 Ill. 623 (1874); *Powell v. Ong*, 92 Ill. App. 95 (1900); *Sell v. Ward*, 81 Ill. App. 675 (1898); *Dana v. Buckeye Coal & Coke Co.*, 38 Ill. App. 371 (1890).

⁷³ In *Nat. Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586 (1889), the pledgor had pledged a share certificate, which probably was worthless at the time, along with his life insurance policy. The pledge agreement authorized the pledgee to sell either before or after default in the event the pledged chattels were "depreciating in market value." When the pledgee learned of the facts, he sold. The court held the sale to be invalid, pointing out that no depreciation had occurred as the stock was worth the same value when sold as it possessed when pledged. It indicated that, just because the pledgee felt badly about his pledge, such fact did not mean he possessed a right to sell prior to a default, for the agreement should not be construed to give him free scope in the exercise of his desires.

have to give the pledgor notice of the default because the fact thereof would be peculiar to the pledgee's knowledge, as in the case of a margin transaction where the broker-pledgee alone would know whether the customer-pledgor's posted margin was sufficient security to cover the latter's indebtedness.⁷⁴

Despite default, even a default following upon a demand, the pledgee would not be free to sell without providing the pledgor with adequate notice of the intended sale in order to give the pledgor an opportunity to take steps to protect himself so far as he might be able to do so. The term "adequate notice," in this connection, contemplates that the pledgor should be informed of the intention, the time, the date, and the place of the proposed sale.⁷⁵ Several obvious reasons for this requirement exist. In the first place, the pledgor, apprised of the proposed sale, might take whatever steps were available to pay off the debt and redeem his property either before or, in some few cases, after the sale. Furthermore, having notice, the pledgor would have an opportunity to encourage others both to attend the sale and to bid, thereby stimulating an interest in the sale to the possible enhancement of the return therefrom.

If the pledgor is to be allowed an opportunity to redeem and the like, he must not only be given notice but must also be given adequate time between the notice of the impending sale and the actual sale itself in which to act. As to what would be regarded as a reasonable or adequate time would have to depend upon the particular situation but the nature of the pledged chattels would also have to be taken into account. If they were of a fluctuating value, or were perishable in character, a shorter time period would be regarded as reasonable than might be true as to items having a steady and ready market. It should also be observed that, if the pledgor is unavailable at maturity, so that the necessary notice cannot be given to him in person, the pledgee would

⁷⁴ *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886); *Hughes v. Barrell*, 167 Ill. App. 100 (1912).

⁷⁵ *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Belden v. Perkins*, 78 Ill. 449 (1875); *Powell v. Ong*, 92 Ill. App. 95 (1900); *Sell v. Ward*, 81 Ill. App. 675 (1898); *Cole v. Dalziel*, 13 Ill. App. 23 (1883).

have to resort to a judicial sale, barring an agreement to the contrary which takes this eventuality into consideration,⁷⁶ for public notice of the time and place of sale would not dispense with the need for private notice to the pledgor.

Even more important than the giving of personal notice to the pledgor would be the giving of general notice to the public at large respecting the details of the projected sale. Notice to the pledgor brings into bearing all of the safeguards he would be capable of marshalling. Prior advertisement, and information at the sale, serves to enlist the aid of the buying public, hence the public notice should be such as would accomplish this desired purpose. The advertisement ought to announce the principals to the sale, their interest in the pledged property, the reason for conducting a sale, as well as the time, the date, and the place of sale. If all this has been done, then the quasi-trust nature of the relationship⁷⁷ will have been recognized, and the rights thereunder will have been preserved. Perhaps this may seem like unnecessary disclosure but notoriety as to the true situation and the parties involved in a pledge transaction would generally be more important to the borrower than would secrecy. If the public is provided with knowledge as to the lender, the amount he has advanced on the faith of the pledge, and other pertinent facts, that knowledge should provide considerable stimulation to an interest in the sale. Value being always a matter of opinion, the fact that a well-known person or organization has made a loan on the faith of a pledge could have wide influence on those members of the public who might be inclined to make bids at a sale of the pledged property. For these reasons, the business convenience to the pledgee-seller in not having to take these extra precautions should be forced to bow to his fiduciary obligation to the pledgor to sell as advantageously as possible so as to limit the pledgor's further personal liability.

The privilege of selling the pledged chattels given to the

⁷⁶ Hughes v. Barrell, 167 Ill. App. 100 (1912).

⁷⁷ A pledge is not a trust, contrary to some authority, for the simple reason that the legal title in the property remains in the pledgor, who is the ultimate beneficiary of the transaction. The relationship, however, does call for a high degree of good faith.

pledgee contemplates the conducting of a public sale.⁷⁸ Such a sale would be one where the general public has been invited, by timely advertisement, to attend and bid at auction for the items sold, hence should be held in a place where the public at large is free to congregate.⁷⁹ A sale held in a private office, or at a place not usually used as a market place, might fail to qualify as a public sale unless sufficient notice had been given to the public inviting them to attend and access thereto was, in fact, accorded to the public.

It has already been observed that the option to sell or to sue on the debt lies with the pledgee. The question then arises as to whether or not the pledgee must sell the pledged chattels in the event the pledgor should request him to do so on or after default. It is well settled law in this jurisdiction that the pledgee need not sell the pledge interest at the request of the pledgor.⁸⁰ Consequently, in the event a proper sale is later made by the pledgee, he may not be held accountable for a loss occasioned by a depreciation in the value of the pledged chattels, even in those instances where a sale, if made when the pledgor had requested it, would have produced a materially greater return. These decisions leave much to be desired. The usual attitude of the courts has been that, since the pledgor has the general property interest in the pledged chattels, it is up to him to pay the indebtedness, after which he may do as he pleases with the property. It must seem apparent that the theory so advanced is untenable. If the pledgor is in default and is seeking to have the pledgee sell his property to mitigate loss, the pledgor would hardly be in a position to redeem. Conversely, if the pledgee is to be held to some fiduciary standard respecting care, use, and manner of sale, it

⁷⁸ *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854 (1888); *Sell v. Ward*, 81 Ill. App. 675 (1898); *Brown*, § 133; *Restate.*, § 48.

⁷⁹ As to whether a sale of listed stocks, made on a stock exchange, would be a public sale, see cases cited in *Meyer, The Law of Stockbrokers and Stock Exchanges* (Baker, Voorhis & Co., New York, 1931), § 87, holding such sales to be public sales. If the pledgor were to argue otherwise, he might be depriving himself of the best market for his property.

⁸⁰ *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624 (1893); *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551 (1868); *Mueller v. Nichols*, 50 Ill. App. 663 (1893). See also notes in 37 Col. L. Rev. 496 and 30 Mich. L. Rev. 978.

would seem only proper that, on the pledgor's petition, an equity court should order a foreclosure to prevent an exposure of the pledgor to unnecessary loss,⁸¹ particularly where the pledged property possesses a value in excess of the amount due on the secured debt plus the necessary expenses of sale.⁸² On the other hand, a decision that the pledgee ought to refrain from selling the pledged chattels after default if, at the time, market conditions proved to be unfavorable to the pledgor could hardly be sustained.⁸³ The few cases that do so hold specifically limit the decision to those situations where the pledgee is thought to be adequately secured.⁸⁴

No doubt a sale of the pledged property would avoid some of the expense and delay incident to the enforcement of the secured debt or to a foreclosure on the pledge, but restrictions placed on the conduct of the sale could also hamper the pledgee by unduly retarding him in his efforts to collect. Salutory as these restrictions may be, it is now customary for the parties to a pledge contract to agree to waive some or all of them. Provisions in pledge contracts authorizing the pledgee to sell where the pledged chattels depreciate in value, either before or after maturity,⁸⁵ to sell at private sale,⁸⁶ to sell without the necessity of giving notice,⁸⁷

⁸¹ See *Brown*, § 133.

⁸² This middle position is taken by *Restate.*, § 52.

⁸³ *Brown*, § 133.

⁸⁴ See, for example, *Muhlenberg v. City of Tacoma*, 25 Wash. 36, 64 P. 925 (1901); *Foot v. Utah Commercial, etc., Bank*, 17 Utah 283, 54 P. 104 (1898). It would appear that a determination to the effect that the pledgee may not have satisfaction of his debt at maturity would be inequitable as it would have the effect of a forced extension of the loan at the risk of the pledgee. Pledgors are wont to be overly enthusiastic about the prospects for the future sale of their property, so what might seem to them to be abundant security today could easily be valueless tomorrow. The theory underlying those cases which have ordered a delay is that the pledgee should not be permitted to sell at a forced sale for barely enough to satisfy the debt and thereby frustrate the pledgor's "just expectation of a surplus." The rationale is untenable, for the parties to a pledge agreement ought to know that the pledgee may need his money at maturity and, for this purpose, may have to sacrifice the property in an unfavorable market. The imposition of a reasonable standard of care on the pledgee does not mean that he should not be able to collect in some manner at maturity, it only means that the method of collection utilized should be reasonably pursued.

⁸⁵ *Nat. Bank of Illinois v. Baker*, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586 (1889).

⁸⁶ *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854 (1888); *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879).

⁸⁷ *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854 (1888); *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Harris v. Thomas*, 37 Ill. App. 517 (1890); *Cole v. Dalziel*, 13 Ill. App. 23 (1883).

to sell free of the pledgor's right to redeem,⁸⁸ to allow the pledgee to bid at the sale,⁸⁹ or any combination of these privileges, are not uncommon. Agreements of this nature are enforceable only to the extent they facilitate collection of the secured debt, so the right to agree on a peculiar method of foreclosing the pledge, or to waive common law rules respecting the sale thereof, is hedged about by some restrictions.⁹⁰ If the agreement should provide for a forfeiture of the property pledged it would, like all penalty agreements, be void as against public policy. On the other hand, an agreement to the effect that the pledgee could keep the chattels at an agreed value, by way of whole or partial satisfaction of the debt, would probably be regarded as valid if it could be shown that the agreed value was fixed without recourse to fraud or duress.

The courts will also endeavor to protect a pledgor from his folly by construing power of sale clauses narrowly. Since the pledgee ordinarily draws the agreement, usually upon advice of counsel, the general rule regarding the construction of ambiguities most rigorously against the drafter will be applied. This does not seem unjust as the pledgor, usually by reason of financial necessity, has no other recourse than to accept the pledgee's terms. Furthermore, since the pledgee is allegedly acting as much for the benefit of the pledgor as for himself, he should be required to act always in strict good faith and be denied the right to shield himself behind a bare literal compliance with the terms of the contract. This view would be particularly applicable where the pledgee has been authorized to purchase at his own sale, but is also followed where the pledgee has used a straw man to effectuate a sale to himself.⁹¹ In addition to construing pledge agreements strictly, courts are ready to discern a waiver by the pledgee of the terms thereof. Mere indulgence, insufficient to constitute

⁸⁸ Restate., § 55.

⁸⁹ Brown, § 133.

⁹⁰ In general, see Seasongood, "Drastic Pledge Agreements," 29 Harv. L. Rev. 277 (1915).

⁹¹ Youngquist v. Hunter, 227 Ill. App. 152 (1922); Dana v. Buckeye Coal & Coke Co., 38 Ill. App. 371 (1890).

laches, may be enough and, once a right to insist on the terms of the contract has been waived, the same may not be reinstated in the absence of a provision covering such a contingency or the giving of a fixed and reasonable notice, by the pledgee, of such intention.⁹²

Sundry illustrations of these principles exist. Whether a contract calls for a waiver of notice to the pledgor would be a matter of construction. Presence of authority to sell at public or private sale does not support an implication of a waiver of notice by the pledgor, and a mere giving of a general notice of an intention to sell would be insufficient. The pledgor, barring agreement to the contrary, must be made acquainted with the time, place, and terms of the projected sale, and all aspects of the sale must be in strict conformity with the agreement. Thus, a waiver of notice to the pledgor will not operate as a waiver of notice as to the public,⁹³ and notice of a public sale would require the conduct of a sale at which the public could gather, after the manner of an auction.

Even if the pledgor should wish, conscientiously, to observe the formalities of a sale under his agreement, he ought to sell no more of the property than is necessary to satisfy his claim, especially where the items pledged are of severable character.⁹⁴ A prospective bidder might be unable to buy the whole of the pledged chattels but might be willing to buy a parcel of them. Sales of that nature would have a tendency to attract more bidders and bidding so, in order to sell only what is necessary to satisfy the pledgee's claim, the pledged property ought to be sold in small lots. This rule possesses the added grace of making it easier for the pledgor to redeem at least some of his property, but it cannot be made to work to the detriment of the pledgee's

⁹² Brown, § 133.

⁹³ It has been held in Illinois that, if the contract authorizes a public or private sale and is silent as to notice, notice is waived, *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854 (1888), but the decision seems wrong on principle. There, however, the plaintiff was guilty of laches, so the result attained was not an inequitable one.

⁹⁴ Ill. Rev. Stat. 1951, Vol. 1, Ch. 77, § 12, particularly imposes the requirements as to judicial sales. See also *Reeve, Illinois Law of Mortgages and Foreclosures* (Callaghan & Co., Chicago, 1932), Vol. 2, § 699.

interest, as where the total of the separate bids falls short of a bid for the whole of the property, and a deficit would be likely to result.

There could be times when a pledgee would himself like to be the purchaser at the sale, perhaps because of the pledgee's financial strength and because of his knowledge of the intrinsic worth of the pledged chattels, making him willing to offer considerably more than the bidding public might be inclined to offer. Under such circumstances, it might be unfortunate indeed if the pledgee should be prohibited from purchasing, leading to a sacrifice sale of the property. On the other hand, a pledgee, being human, might succumb to the desire to gain at the pledgor's expense, as by attempting to procure the property at a fraction of its value. The pledgee, exercising his right to sell the security res, being placed in a fiduciary capacity, is duty bound to attempt to obtain a maximum return. As a consequence, it is now well established, absent a stipulation to the contrary, that the pledgee may not become a buyer at his own sale,⁹⁵ for there is a complete incompatibility between the pledgee's duty of care owed to the pledgor and the natural desire of a purchaser at a sale to buy at a bargain.

If the pledgee has made an unauthorized purchase at his own sale, the pledgor will have an option of affirming the sale and suing for the surplus,⁹⁶ or of disaffirming the sale. In the latter event, the relationship of the parties is unchanged and the pledge continues to exist with all its attendant consequences.⁹⁷ In the last mentioned instance, since the pledged property would remain in the pledgee's possession, he would be in a position to return the goods if, and when, the pledgor should seek to redeem, so the abortive sale would not work a conversion. Even without an

⁹⁵ *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879); *Chi. Art. Well Co. v. Corey*, 60 Ill. 73 (1871); *Riddle v. Todd*, 306 Ill. App. 252, 28 N. E. (2d) 326 (1940); *Youngquist v. Hunter*, 227 Ill. App. 152 (1922); *Killian v. Hoffman*, 6 Ill. App. 200 (1880).

⁹⁶ *Chi. Art. Well Co. v. Corey*, 60 Ill. 73 (1871); *Youngquist v. Hunter*, 227 Ill. App. 152 (1922); *Killian v. Hoffman*, 6 Ill. App. 200 (1880).

⁹⁷ *Stokes v. Frazier*, 72 Ill. 428 (1874); *Chi. Art. Well Co. v. Corey*, 60 Ill. 73 (1871); *Riddle v. Todd*, 306 Ill. App. 252, 28 N. E. (2d) 326 (1940); *Dana v. Buckeye Coal & Coke Co.*, 38 Ill. App. 371 (1890); *Killian v. Hoffman*, 6 Ill. App. 200 (1880). See also *Restate.*, § 51.

agreement permitting the pledgee to purchase the pledged chattels, there is authority to the effect that a pledgee may buy at a properly conducted judicial sale,⁹⁸ and there is no reason to dispute the validity of such holdings, for the rights of the pledgor would be adequately protected by the court's supervision of the sale. Surprisingly enough, some cases have gone so far as to allow the pledgee to buy the security res at a private sale,⁹⁹ but there is nothing to commend such decisions.

It has already been suggested that pledgees may not be loath to ignore their responsibilities when attempting to liquidate pledges after default. This attitude may well go beyond the point of self-dealing. Pledgees have, at times, appeared to be quite willing to bring about a ruthless sacrifice of pledged property, being apparently interested only in recouping on the loan.¹⁰⁰ The reprehensible desire to make a personal profit may be sublimated to an equally unworthy desire to aid one's friends to a profit at the pledgor's expense.¹⁰¹ Other acts may be quite as unfortunate, as where a sale may be made when the pledgee knows the market price will not approximate the fair value and an immediate sale is unnecessary, or where acts have been done which would mislead a purchaser, or prevent fair bidding, because of ignorance regarding the true nature of the property offered for sale,¹⁰² or intended wilfully to mislead the pledgor.¹⁰³ It is sufficient to say

⁹⁸ *Anderson v. Olin*, 145 Ill. 168, 34 N. E. 55 (1893); *Riddle v. Todd*, 306 Ill. App. 252, 28 N. E. (2d) 326 (1940). See also *Foltz v. Harden*, 139 Ill. 405, 28 N. E. 786 (1891), where a co-pledgor assumed this right to exist and used it as a defense to an action against himself on the secured debt.

⁹⁹ See *Seder v. Gould*, 274 Mass. 223, 174 N. E. 311, 76 A. L. R. 700 (1931).

¹⁰⁰ In *Kessler v. Sherman*, 281 Ill. App. 148 (1935), for example, a pledged note of \$7000 face value, securing a debt of \$6610, was sold for \$1800. *Powell v. Ong*, 92 Ill. App. 95 (1900), was a case wherein a \$650 face value pledged note was sold for \$100, the amount of the secured debt. The case of *Dana v. Buckeye Coal & Coke Co.*, 38 Ill. App. 371 (1890), involved valuable mortgage bonds which were sold for a fraction of their worth, the sale price being equal to the amount of the secured debt. In *Killian v. Hoffman*, 6 Ill. App. 200 (1880), a \$1000 par value corporate share certificate was sold by the pledgee, for \$500, to one of his own employees.

¹⁰¹ *Dana v. Buckeye Coal & Coke Co.*, 38 Ill. App. 371 (1890); *Killian v. Hoffman*, 6 Ill. App. 200 (1880).

¹⁰² *Farrell v. Stafford*, 203 Ill. App. 357 (1917).

¹⁰³ *Zimpleman v. Veeder*, 98 Ill. 613 (1881); *Union Trust Co. v. Rigdon*, 93 Ill. 458 (1879). In these cases it was held that an agreement between a creditor and his debtor, whereby the debtor agreed to relinquish all his claim to the pledged

that none of these ends will be tolerated, even if within a literal interpretation of the terms of the pledge agreement, for courts have been zealous to set aside such attempts wherever the same could be done without injury to innocent third parties. Merely because a pledgor has been disappointed in the return from the sale, however, is inadequate reason to set aside a sale, for adequacy of the sale price is not regarded as a controlling criterion.

This report was undertaken with the thought of assembling, at one convenient place, a record of the existing decisions of one jurisdiction having bearing on pledge law. For that reason, no attempt has been made, except by indirection, to deduce any conclusions therefrom or to offer any recommendations with respect thereto. The reader, informed as to the state of the law, is, therefore, left free to reach his own opinion as to the merits, or demerits, of this ancient security device. It is enough to note that it does perform a valuable function in the economy of today and to express the belief that it will probably continue to do so with respect to the future.

chattels in satisfaction of the creditor's claim on the debt, was not, correctly speaking, a sale of the secured debt but was, rather, a compromise. Such being the case, the compromise made, even though the secured debtor had authorized a sale without notice, was regarded as a conversion for the compromise was worked out with a pledgor-surety and did not constitute a sale as contemplated by the pledge agreement.

NOTES AND COMMENTS

SCIENTIFIC AIDS FOR LEGAL RESEARCH

Concern has been expressed, during the past several years, over the flood of legal literature appearing in the form of reported decisions, statutes, administrative rulings, treatises, digests, reviews, and the like.¹ A citation of a few statistics at this point should be enough to demonstrate that there is due cause for this concern. Reported judicial decisions alone have grown from eighty thousand in 1850 to approximately two million cases at the present. Courts of last resort annually hand down in excess of twenty-five thousand decisions.² If, to this bulk, one should add the decisions of state appellate courts, those emanating from the federal district courts, and the product of the federal courts of appeal, the annual aggregate of reported cases alone reaches a significant figure.³

In an average legislative year, over forty-six thousand pages of statutory law are issued,⁴ thereby adding to the bulk of legal materials. Only eight states have statutes requiring the publication of the regulations and decisions of their respective administrative boards, hence no adequate statistics exist encompassing the total volume of matter of administrative significance. But some idea of the magnitude of materials to be found in this area of law alone may be gathered from the fact that, in a single year, the reports of four federal administrative agencies⁵ filled twelve volumes whereas only six volumes were required to report the decisions of the lower and intermediate federal courts during the same period.

These statistics relate, of course, to primary sources of the law. They do not take into account the growth that has been observed in the form of secondary sources such as treatises, citators, special loose-leaf services,

¹ For a few representative discussions, see Kelso, "Does the Law Need a Technological Revolution," 18 Rocky Mt. L. Rev. 378 (1946); Harper, "Legal Research, Technology and the Future," 24 Cal. S. B. Jour. 104 (1949); Bernstein, "Judicial Logorrhea," 75 N. J. L. Rev. 30 (1952); Peairs, "Legal Bibliography: A Dual Problem," 2 J. Legal Educ. 61 (1949); Teiser, "Tomorrow's Law Books," 38 A. B. A. Jour. 378 (1952); Maguire, "Adaption of Modern Mechanical and Electrical Aids to the Assembly of Tax Information," 7 Inst. Fed. Tax. 1008 (1949).

² See Kelso, "Does the Law Need a Technological Revolution," 18 Rocky Mt. L. Rev. 378 (1946).

³ At present, the total number of volumes included in the National Reporter System exceeds 3600. About fifty volumes are being added in each year.

⁴ Vanderbilt, *Men and Measures in the Law* (Alfred A. Knopf, New York, 1949), p. 12.

⁵ The agencies referred to are the Bureau of Internal Revenue, the Tax Court, the National Labor Relations Board, and the Interstate Commerce Commission.

etc., which have also multiplied in number. There is no question, then, but what the amount of material affecting the study, and a knowledge, of law will continue to expand at an ever-increasing rate. In that regard, studies now exist which show that general libraries are following an exponential law of growth, doubling their collections every sixteen years.⁶ Law libraries are not escaping this trend.⁷

While it is true that all fields of knowledge are faced with an ever-increasing store of recorded materials, the lawyer is most peculiarly and immediately concerned. Chief Justice Vanderbilt not long ago said: "Although slavery to the product of the printing press is not peculiar to the legal profession, the burden on the law is greater than that in any other department of learning. This follows by reason of our theory of judicial decisions and our professional attitude toward the theory of the past."⁸ But the problem under discussion is not a new one for, in 1829, a German jurist predicted that "in spite of the many advantages of a system of case law . . . there will come a time when the sources, i. e., the traditional decisions, will accumulate to such a degree . . . and the rules which have been found will be limited by so many and such fine distinctions that, instead of securing the interest of individuals, they will only serve as a means of litigation."⁹

By 1922, a famous philosopher of the common law was complaining that "law books are no longer capable of being read. Soon . . . they will be incapable of being written by individual effort and will become the product of cooperate syndicates . . . law reports will multiply . . . while the law itself becomes steadily less harmonious and less consistent."¹⁰ One year later, Harlan F. Stone, soon to become Chief Justice of the United States Supreme Court, issued a further warning. "Lawyers as a class," he wrote, "have allayed any uncomfortable apprehensions as to the future . . . by the complacent acceptance of the ingenious devices

⁶ Rider, *The Scholar and the Future of the Research Library* (Hadham Press, New York, 1944); Ridenour, *Bibliography in an Age of Science* (University of Illinois Press, Urbana, 1950).

⁷ For example, the library of Chicago-Kent College of Law, in 1926, was in excess of 6,500 volumes. By 1952, it had grown so as to contain in excess of 20,000 volumes. On the basis of this tripling in size in twenty-five years, the library, if continuing to expand at the same rate, would contain nearly 80,000 volumes by 1975.

⁸ See preface, 1942 *Ann. Surv. Am. Law*, p. v.

⁹ Quoted from Berman, "The Challenge of Soviet Law," 62 *Harv. L. Rev.* 220 (1949). In 19 No. *Amer. Rev.* 433 (1824), appears an early American recognition of the problem, one writer stating: "The multiplication of reports . . . is becoming an evil alarming and impossible to be borne . . . By their number and variety they tend to weaken the authority of each other . . . [T]hey come upon us . . . in an overwhelming flood, intermingled with digests, compends, and essays without number." See also "The American Jurist," 29 No. *Amer. Rev.* 418 (1829).

¹⁰ Salmond, "The Literature of the Law," 22 *Col. L. Rev.* 197 (1922), at p. 199.

for digesting and finding the law as offering a real solution of their difficulties. But every new citator, every new digest . . . comes like Banquo's ghost, to confront us with the disquieting reality that the common law system of precedents cannot continue indefinitely."¹¹ The same "ingenious" devices he mentioned are still the only methods currently available to aid in the search for law.

As a result, the dire consequences against which he warned are fast becoming a reality. Recognition has been given to the fact that the lawyer of today is less able to know the law in the same manner, and to the same extent, as was true of the lawyer of a generation or two ago. This, admittedly, is a serious criticism to advance, but there would seem to be sufficient authority to uphold the point and a few quotations should be enough to furnish conviction. Professor Simpson not too long ago remarked that "no man can any longer know the American law, nor for that matter the law of his own state."¹² Another has written that the fact is "that clients are advised; cases are litigated before courts; . . . and opinions and decisions . . . are rendered, on inadequate or completely erroneous information. The law in point . . . is so vast that with today's legal tools, much that is vital is necessarily disregarded."¹³ The basis for this, says still another, is the "inability of lawyers themselves to know even the pattern or the materials of the law they must evoke in their client's interest."¹⁴ It is becoming rapidly impossible, says a fourth, for lawyers "by their traditional digest-searching methods, or even by . . . citators, to be sure of making a clean sweep of the multitudinous patterns of precedents bearing upon their current litigation, bargaining, and planning."¹⁵ No wonder, then, that the possibility of a professional breakdown is a grim threat to the effectiveness of the modern lawyer.

The chaos that results from the plethora of reported law can be evidenced by a concrete illustration. A recent New Jersey case involved a dispute between a local labor union and its parent organization regarding the right to possess the funds of the local. The case was decided on the basis of the applicability of the contract doctrine relating to frustration of purpose.¹⁶ The headnotes to the reported decision, however, place the

¹¹ Stone, "Some Aspects of the Problem of Law Simplification," 23 Col. L. Rev. 319 (1923), at p. 320.

¹² 1947 Ann. Surv. Am. Law, pp. 830-1.

¹³ Kelso, "Does the Law Need a Technological Revolution," 18 Rocky Mt. L. Rev. 378 (1946), at p. 380.

¹⁴ Peairs, "Legal Bibliography: A Dual Problem," 2 J. Legal Educ. 61 (1949), at p. 66.

¹⁵ See discussion by Maguire, on the topic "Specialized Knowledge and Professional Activity," at a symposium on Machine Techniques and Information Selection, held at Mass. Inst. of Technology, June 10-11, 1952. The proceedings thereof are to be published in a forthcoming issue of American Documentation.

¹⁶ *Edwards v. Leopoldi*, 20 N. J. Super 43, 89 A. (2d) 264 (1952).

case under the topic of "Labor Relations" and it will so appear in the digest services. It should be obvious to anyone that a lawyer with a problem involving the above-mentioned doctrine would commence his search of the digests under the topic of "Contracts" and, in all probability, would not be led to the citation regarding this case. Although the decision therein utilizes four pages to discuss the contract doctrine and includes an excellent history of its development, one who does not know enough to search for this case under the heading of "Labor Relations," or who does not stumble across the case by a fortunate accident, will miss a perfectly good case in point.¹⁷ This is but one example; others could be cited.¹⁸

The example just mentioned was not presented for the purpose of directing criticism toward the publisher of the legal tool in question, or toward the publishers of any of the existing legal tools. If every reported case were to be indexed and digested under all possible legal points mentioned in the case, existing legal tools would become entirely unmanageable. As it is, an average volume of reported decisions now devotes as much as forty per cent of the total of its printed pages to index material of the character of headnotes, tables of cases, tables of statutes construed, and the like.¹⁹ Obviously, under any continuation of traditional methods of indexing and digesting, sheer bulk alone would force a limitation on the number of digest notes based on any one case. Not even extreme accuracy in reporting and classifying cases, then, will provide the solution.

Realization of this situation not only caused the late Chief Justice Stone to issue his warning, it led him to offer, as his solution, a proposed codification of the common law.²⁰ There was, at the time, a considerable display of interest in the idea of codification as it was felt that, once codification had been adopted, it would be possible to dispense with accumulated case law and its resulting bibliographic confusion. That interest has, however, since waned and there seems little likelihood that existing case law will be replaced by codes.²¹ Consequently, with an

¹⁷ The particular example has been cited in an unpublished paper entitled "Searching Legal Literature," circulated by a Special Committee of the New Jersey State Bar Association.

¹⁸ The classic example appears in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935). Suit had there been instituted, and an appeal had been carried to the United States Supreme Court, based on an administrative regulation. It developed that the regulation in question had been revoked, although the parties were unaware of the fact.

¹⁹ See note 17, ante.

²⁰ Stone, "Some Aspects of the Problem of Law Simplification," 23 Col. L. Rev. 319 (1923).

²¹ See, for example, Peairs, "Legal Bibliography: A Dual Problem," 2 J. Legal Educ. 61 (1949). Experience with the several Restatements, useful as they may be, has not proved too successful in the direction of codification.

awareness of the coming crisis involved in the storage and use of legal literature, other methods and solutions are constantly being sought.

Some have offered pleas for shorter and more concise judicial decisions,²² but it is doubtful, human nature being what it is, whether these pleas will ever have the desired effect. Others have cast an eye on the developments of science, speculating with the possibility of adapting modern scientific knowledge to antiquated methods of legal research. With the advent of modern microphotography, it is now technically possible for a lawyer to have a complete law library in his desk drawer²³ and, with the rapid advancements being made in telecommunication, it is possible to foresee the time when the lawyer's desk will be equipped with a television screen across which, on dialing a number, all statutes and cases in point can be made to flash.²⁴ While this may seem utopian, the tremendous possibilities involved in modern science seem capable of lending themselves to bibliographical purposes.²⁵ Any difficulty experienced to date lies in the fact that little experimentation has taken place along these lines, hence it is not easy, at present, to evaluate intelligently the extent to which scientific aids may be utilized in legal research.

For the most part, present day experimentation with regard to bibliographical matters has occurred in connection with scientific literature. The American Chemical Society, for example, has organized a Division on Chemical Literature and has delegated to it the responsibility of developing machine methods for searching chemical literature.²⁶ The legal profession can profit from the experimentation thus far carried on but, to obtain optimum benefit, a more active interest in the development of scientific aids for use in connection with legal research will have to be displayed. As will be pointed out hereafter, the successful adaptation of

²² An excellent discussion of the unnecessary wordiness found in many decisions is contained in Bernstein, "Judicial Logorrhea," 75 N. J. L. Rev. 30 (1952). In this connection, Simpson has pointed out that, out of a total of 1054 decisions in the field of Equity reported in 1947, only 11.5 per cent were worthy of comment, and only 0.1 per cent were worth discussing at length: 1947 Ann. Surv. Am. Law 830-1. Problems relating to the length and quality of judicial decisions go beyond the scope of this paper.

²³ See Price, "The Microcard Foundation," 39 A. B. A. Jour. 304 (1953), and Teiser, "Tomorrow's Law Books," 38 A. B. A. Jour. 378 (1952).

²⁴ A description of "push-button" legal research is contained in Kelso, "Does the Law Need a Technological Revolution," 18 Rocky Mt. L. Rev. 378 (1946). That article represents an adaptation to the field of legal research of a discussion by Bush, under the title "As We May Think," which appeared in the July, 1945, Atlantic Monthly. Both articles give an exciting picture of what could, some day, be a reality. It should be pointed out, however, that much more planning will need to be done before the methods there described could even approach reality.

²⁵ Ridenour, *Bibliography in an Age of Science* (University of Illinois Press, Urbana, 1950).

²⁶ See, for example, "Reports on Papers Presented before the Division of Chemical Literature at the American Chemical Society Meeting," 27 Chem. and Eng. News 2991-13 (1949).

machine methods to law will necessitate a more thorough content analysis of the subject matter contained in legal materials. Such content analysis would possess real value only if done by those trained in law, but lawyers too must become familiar with existing scientific aids if such aids are to be utilized, or developed further, to meet the problems inherent in any search of legal literature.

The problem of space limitation, increasingly aggravated as volume after volume is added to library shelves, can be met through the use of microtext. This generic term applies to any process through which, by means of photography, the printed page can be reduced in size.²⁷ At present, the normal ratio of reduction varies from sixteen to one up to twenty-four to one, but a camera exists, in the experimental stage, which can reduce the normal printed page by a ratio of three hundred to one! Two basically different forms of microtext are in use; the microfilm and the microprint.²⁸ The former is printed on a transparent film and is usually placed on reels similar to those used with home projection machines; the latter appears in opaque form, printed on individual cards or special paper and preserved in flat form. Unfortunately, there is at present no standardization either as to size or form,²⁹ but one common element, true of all types, lies in the fact that a special reading machine is required to return the microtext to something approximating original size. While the quality of readability found in relation to these reading machines is constantly improving, these machines have not yet attained the degree of clarity found in the actual printed page. Much more important, as a practical proposition, is the fact that each type of microtext requires the use of a different type of reader so one about to start his own library on microtext³⁰ would need to devote a disproportionate amount of money and space to reading machines.³¹

²⁷ A detailed description of all forms of microphotography, with a discussion of the relative merits of the different types, appears in "Original versus Microphotographed Editions of Documents," 2 *Am. Documentation* 150 (1951). See also Price, "The Microcard Foundation," 39 *A. B. A. Jour.* 304 (1953).

²⁸ While many varieties of microprint are being produced, the bulk of production is limited to two forms; the Microcard, 3" x 5" in size and similar to the standard library filing card, and the Microprint, which appears on 6" x 9" paper sheets. Both processes are copyrighted.

²⁹ Problems raised by lack of standardization are discussed in Rider, "The Possible Correlation of all forms of Microtext," 2 *Am. Documentation* 152 (1952), and in Price, "The Microcard Foundation," 39 *A. B. A. Jour.* 304 (1953).

³⁰ A considerable amount of legal material is already available in microtext. For example, the Federal Register from 1935 to 1939, the U. S. Patent Office Gazette from 1949, and some law reviews are available on microfilm. Price, "The Microcard Foundation," 39 *A. B. A. Jour.* 304 (1953), lists the publications presently available on microcards.

³¹ Persons familiar with the economic waste present in the case of competing sets of state statutes, as was formerly the case in Illinois, will realize the saving which can be gained by a concerted effort on the part of the bar to bring about agreement among the private publishers in the matter of standardization and the elimination of competitive costs.

Even if standardization in the size and form of microtext were to come about, making possible the use of but one standard-sized reading machine, other serious problems would remain. No mere reduction in the size of law books will aid one engaged in a search for a particular statute, a decision, or a ruling. Even if the entire National Reporter System were to be placed on microcards, requiring no more physical space than that occupied by an ordinary library catalog tray, still the necessity for searching through indices, digests, and annotations would remain. In fact, it is likely that the net result would be to increase the difficulty in locating the desired statute or decision for the reduction in size would allow distracting material to come to hand which would, ordinarily, be disregarded. What is needed is not only a reduction in the physical size of the collection to be searched but also the development of some technique whereby that which is available may be searched quickly and accurately. It is in this respect that the use of scientific aids becomes most feasible. If the principal objection to present methods of search lies in the fact that search entails the necessary performance of routine and time-consuming tasks, with some degree of uncertainty that all facets of the research undertaken have been exhausted, then the development of mechanical means to perform routine operations, both quickly and accurately, should obliterate most of the fundamental problems involved in legal research.³²

One possibility, in this regard, lies in the adaption of the punched-card technique to matters of legal research. While no detailed discussion of this method will be attempted,³³ the essential quality of the punched card lies in its ability to hold an immense amount of information within a limited space coupled with a quick means for the retrieval of that information. Two main classifications of punched cards exist, the hand-sorted and the machine-sorted methods. Under the former, technically referred to as the notched card method, an ordinary filing card, of any size, is fabricated with a series of holes running around the four borders. A code is developed and information is punched into the card by cutting through one of the holes. For example, if hole No. 3 should be designated for "Contracts," then, by inserting a needle through that hole, all cards in a given pack containing information relating to "Contracts" would fall

³² The interim report of the Center for Scientific Aids to Learning, Mass. Inst. of Technology, Feb. 1, 1951, p. 34, states: "The situation in legal documentation is startlingly different . . . An elaborate interlocking reference system permits—if sufficient time and patience is invested—the tracking-down of the precedents pertinent to any given case . . . The weak spot is the fact that considerable effort is required to work through the reference aids provided."

³³ A more adequate and detailed explanation concerning the use of punched-cards for bibliographic purposes is contained in Casey, *Punched-cards; Their Application to Science and Industry* (Reinhold Pub. Co., New York, 1951).

off the needle when the pack is lifted. The card itself could contain any desired information, such as citation, an abstract of the case, or even a microfilm strip of the entire decision. One main limitation exists to the use of notched cards and that is that relatively small amounts of information may be coded due to the limited space for holes around the border. Such cards can, however, form a very useful tool for handling these small amounts of information. Thus, one interested only in the Illinois law relating to Damages could set up punched card references to all pertinent statutes and decisions without difficulty and then, with a single pass of the sorting needle, could have all citations to a particular aspect of that topic made immediately available.³⁴ The usefulness of such a collection, however, is endangered once the collection to be searched becomes too large.

Experimentation has also been carried on with respect to machine-sorted cards,³⁵ which cards, while similar to hand-punched cards, differ for bibliographical purposes in that an increased amount of information may be punched therein and greater speed in selection can be attained, particularly in the case of larger collections. Even with this greater speed, machines presently on the market are not fast enough to adapt themselves suitably for literature-searching for their optimum capacity would appear to be a collection of one-half million documents³⁶ whereas, as indicated above, the number of cases alone reported to date already exceeds that figure. All equipment in use to date has been engineered primarily to handle business data. With the amount of bibliographic data so far in excess thereof as it is, current machines are simply unable to cope with the mass. What is required, then, is an electronic searching machine specifically designed for use in connection with literature-searching. Such a machine is now in the process of being built by a leading business machine organization which claims its product is designed to scan five million documents per hour.³⁷ Given such a machine, and a comprehensive code to legal literature which could be "read" by the

³⁴ In this connection, an interesting experiment has been undertaken at the University of Santa Clara, California. Each decision involving community property law is there being placed on a Microcard, properly notched and coded for every aspect of community property law discussed in the decision. As new decisions are handed down, a Microcard thereof is sent to the subscribing lawyer, who can thereby find all cases in point in a few minutes: Merryman, "Legal Research Without Books," 44 Law Lib. Jour. 7 (1951). The New Jersey Law Institute is also carrying on experimentation with hand-sorted punched-cards with a view toward setting up a "Perpetual Revision of Rules of Court Procedure in New Jersey." Letter to author from Vincent P. Buinno, Chairman, Committee on New Jersey Law Institute.

³⁵ Casey, Punched-cards; Their Application to Science and Industry (Reinhold Pub. Co., New York, 1951), p. 115.

³⁶ 30 Chem. and Eng. News 2806 (1952).

³⁷ Ibid.

machine, present difficulties posed by the search for precedent and authority, whether in the form of constitutional, statutory, or case law, would be ended.³⁸

Before a dream of this character could be made a reality, one serious drawback would have to be overcome. This, of course, has to do with the necessity for developing some form of "machine language,"³⁹ the intricacies and technicalities of which need not be discussed here. It is necessary, however, in this connection, to note that before "any machines can be used for information searching, the information must be analyzed and coded . . . [T]he availability of any machine . . . cannot of itself solve the . . . problem. A major investment would have to be made for handling any large file of information before machine searching would be possible."⁴⁰ The tremendous cost of devising the "machine language" and turning the existing mass of legal literature into usable machine material would be staggering at the start, but not so tremendous as to forbid the giving of consideration to, and development of, the necessary code. The power of an organized bar, if needed, could well prove helpful at this point.

Other electronic machines exist, such as digital computers, electronic copying pencils, the Ultrafax, with its theoretical ability to transmit one million words per minute for reprinting at another place, and the like. Each has its drawbacks in requiring the use of an elaborate machine language or of being still in the developmental stage to merit serious discussion for the present.⁴¹ There is one machine, however, that does offer itself as being extremely adaptable to the solution of problems involved in the searching of legal literature and that is the Rapid Selector as developed by Ralph R. Shaw, Librarian of the United States Department of Agriculture.⁴² It was designed with bibliographical methods specifically

³⁸ Such a machine would be able to distinguish between a majority decision, a concurring opinion, and a dissenting one; between decisions of lower and higher courts; between good decisions and unimportant ones, all provided a suitable code was developed and intelligently applied. A machine of this character would seem to be the answer to the lawyer's prayer.

³⁹ The need for a "machine language" is pointed out in 30 *Chem. and Eng. News* 2806 (1952), where it is indicated the "language" will have to be "over and above the code that is used to express letters, numbers, and symbols in terms of holes in a card; it refers to the way in which the linguistic and numeric elements will be put together so that the machine will understand them."

⁴⁰ Bagley, "Electronic Digital Machines for High Speed Information Searching," an unpublished master's thesis offered to the Department of Electrical Engineering, Mass. Inst. of Technology, 1951.

⁴¹ See Shaw, "Machines and the Bibliographical Problem of the Twentieth Century," quoted in Ridenour, *Bibliography in an Age of Science* (University of Illinois Press, Urbana, 1950).

⁴² While many articles have appeared on the subject of the Rapid Selector, Shaw has prepared two of the best, with illustrations. They appear in Ridenour, *Bibliography in an Age of Science* (University of Illinois Press, Urbana, 1950), and Shera, *Bibliographic Organization* (University of Chicago Press, Chicago, 1951), pp. 200-25.

in mind, hence its appealing factor lies in its ability to handle literature already organized according to existing classification schemes. The stumbling block of developing a code is, thereby, eliminated and the familiar classification of the law presently known to all lawyers can be retained.

The Rapid Selector utilizes an ingenious combination of microfilm and electronics. For its operation, an abstract of an article is placed on one-half of an ordinary 35 mm. microfilm. The other half-space is used for coding six different subject aspects of the abstract. The reel of microfilm is then placed in the Selector which is also equipped with a high-speed camera, so rigged that, as the reel turns, the camera will take a picture of each abstract, and only those abstracts, containing information pertinent to the desired subject. To illustrate the possible use of such equipment in connection with legal research, assume that the five Decennial Digests plus the issues of the General Digest were placed on one reel of microfilm. With the Rapid Selector set to select all digests bearing on "Wills; Attestation," or some other topic, a copy of every digest bearing on the topic can be reproduced in four minutes or less. The film containing these reproductions could then be shipped anywhere at low cost and be examined at leisure, saving the lawyer untold time presently spent in poring over scattered volumes and relieving him of the expense of maintaining such sets in his library. Up to the present, the Rapid Selector has been used primarily in connection with scientific literature, hence no adequate information is available bearing on its actual functioning in relation to legal matters. Undoubtedly, much experimentation would be necessary, but the flexibility and speed of the device would indicate that it should receive intelligent consideration on the part of the legal profession.

Nothing that has been said herein would operate to eliminate the need for well-trained, competent lawyers. They would still have to use their unique professional skills in the marshalling of the information so gathered, in forming conclusions thereon, and in directing the uses to which such information should be put. Revolutionary changes in the end-purpose for legal research, therefore, are not imminent. With more active support on the part of the legal profession, however, there is occasion to hope that an increasing use of scientific aids will lead to better methods for controlling the constantly accumulating mass of legal literature, thereby releasing the lawyer from much unproductive, expensive, and time-consuming work, while operating to make the law more readily available to all, no matter where located.

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DISCUSSION OF RECENT DECISIONS

CRIMINAL LAW—EVIDENCE—WHETHER OR NOT A DEFENDANT IN A FELONY PROCEEDING WHO TESTIFIES IN SUPPORT OF DEFENSE OF ENTRAPMENT MAY BE CROSS-EXAMINED AS TO A PRIOR CONVICTION FOR A SIMILAR OFFENSE—A seldom raised issue of evidence law received the attention of the United States Court of Appeals for the Ninth Circuit in the case of *Carlton v. United States*.¹ Charged with a felonious selling of morphine

¹ 198 F. (2d) 795 (1952).

to a government agent, the defendant there took the stand in the trial court and testified in support of a claimed defense of entrapment. On cross-examination, and over objection, the prosecution was permitted to bring out the fact that the defendant had previously been convicted of related offenses, but of the grade of misdemeanor, and the defendant was convicted. On appeal, the conviction was affirmed when the court stated the doctrine to be that, where the defense of entrapment has been raised, inquiry as to prior convictions for similar offenses, both misdemeanors and felonies, represents a permissible way to secure evidence by way of rebuttal.²

The problem concerned in the instant case deals with one aspect of the law relating to the admissibility of evidence tending to establish previous offenses by the same defendant. It would appear to be the general rule that evidence relating to previous crime is not competent for the purpose of proving guilt of the offense with which the defendant stands charged,³ but there are many exceptions to this rule and, as is quite often the case, the exceptions seem to be more often applied than the rule itself. These exceptions, allowing the admission of evidence regarding separate offenses, can be grouped under two main headings, to-wit: (1) where it is necessary to admit such evidence because the proof is part of the *res gestae*, and (2) where evidence relating to such prior acts tends to establish the defendant's knowledge, intent or motive.

An illustration of the first exception may be found in the case of *United States v. Tandaric*⁴ where relevant evidence tending to establish a material fact was not excluded simply because it also disclosed that the defendant had committed another offense. Similarly, in *Bracey v. United States*,⁵ it was said that evidence of other criminal acts would be admissible when the acts were so blended or connected with the one on trial that proof of the one incidentally involved proof of the other,⁶ explained the circumstances thereof,⁷ or tended logically to prove any element of the crime charged.⁸ Actually, in such cases, the test used in determining the

² The court pointed out that it was better practice for the prosecution to produce the record of past convictions, where available, but that it would be permissible to elicit the same evidence on cross-examination.

³ See, for example, *People v. Novotny*, 371 Ill. 58, 20 N. E. (2d) 34 (1939).

⁴ 152 F. (2d) 3 (1945), cert. den. 327 U. S. 786, 66 S. Ct. 703, 90 L. Ed. 1012 (1946).

⁵ 79 App. D. C. 23, 142 F. (2d) 85 (1944), cert. den. 322 U. S. 762, 64 S. Ct. 1274, 88 L. Ed. 1589 (1944).

⁶ *Copeland v. United States*, 55 App. D. C. 106, 2 F. (2d) 637 (1924).

⁷ *Behrle v. United States*, 69 App. D. C. 304, 100 F. (2d) 714 (1938).

⁸ *Shettel v. United States*, 72 App. D. C. 250, 113 F. (2d) 34 (1940). In *Murphy v. State*, 72 Okla. Cr. Rep. 1, 112 P. (2d) 438 (1941), the view was expressed that proof concerning any previous acts of the defendant could be admitted in evidence against him provided the same possessed any logical or legal tendency to prove any matter then in issue.

admissibility of evidence has been one bearing on the materiality of the proof in relation to the offense at hand.⁹

The second exception appears to have been stated more often and is the one more nearly involved in the instant case. It seems to be well-recognized law that, where the intent of the defendant is in issue, evidence as to previous acts may be admitted for the purpose of establishing that intent. In *People v. Popescue*,¹⁰ for example, the Illinois Supreme Court approved the admission of evidence which, while it disclosed the commission of a previous offense, tended to establish the defendant's knowledge or intent, his motive for the commission of the crime, and the existence of a common scheme or plan. In that case, two defendants were accused of murder. Each claimed the death was due to an accident and objected to the action of the trial judge in receiving evidence to the effect that a similar crime had been committed by the defendants some three hours prior to the murder in question. The evidence was declared to be admissible as it had been offered for the purpose of showing intention with regard to, but not for the purpose of showing the commission of, the later crime. In that regard, the Georgia case of *Mimbs v. State*¹¹ goes as far as any in admitting evidence concerning independent and unrelated acts on the part of the defendant, the court there stating the doctrine to be one under which evidence as to an offense other than that charged against a defendant is admissible if such evidence is offered for the purpose of proving, and tends to show, a common design, scheme, plan, or purpose, or bears any other rational connection with the offense for which the defendant is being tried.

In cases of this character, Professor Wigmore has suggested that it is the desire of the courts to discover the intent which accompanied the act; that evidence of the prior doing of similar acts, whether clearly a part of a scheme or not, would be useful in reducing the possibility that the act in question was done with innocent intent; that the argument is based purely on the doctrine of chances; so there must be a similarity in the various instances in order to give them probative value.¹² For these reasons, evidence of prior acts has been received most often in cases involving sex crimes. In the interesting case of *Bracey v. United States*,¹³ for example, the defendant was convicted of carnally knowing a twelve-year old girl. The defendant, in an effort to support an inference of conspiracy to secure a conviction, had cross-examined his own small step-

⁹ *Copeland v. United States*, 55 App. D. C. 106, 2 F. (2d) 637 (1924).

¹⁰ 345 Ill. 142, 177 N. E. 739, 77 A. L. R. 1199 (1931).

¹¹ 189 Ga. 189, 5 S. E. (2d) 770 (1939).

¹² Wigmore, *Evidence*, 3d Ed., Vol. 2, p. 200.

¹³ 79 App. D. C. 23, 142 F. (2d) 85 (1944), cert. den. 322 U. S. 762, 64 S. Ct. 1274, 88 L. Ed. 1589 (1944).

daughter, who had testified as an eye-witness to the criminal act. Upon re-direct examination of this witness, the prosecution asked her why she did not like the defendant and she mentioned that the defendant had done the same thing to her. The defendant objected to the admissibility of such evidence, but the court received the testimony relating to the prior offense to rebut the inference and defense of conspiracy, and this was upheld as being within the discretionary power of the trial judge to determine what evidence should be regarded as admissible.¹⁴ In another case, that of *People v. Westek*,¹⁵ the evidence of prior acts of illicit relations with young boys was used to rebut the defendant's claim of good character. The doctrine, nevertheless, has its limitations. In *Lovely v. United States*,¹⁶ a defendant accused of rape had relied on the defense of consent. To rebut this, the prosecutor brought in evidence to show that the defendant had raped another girl fifteen days earlier at the same place, but it was held that evidence would be inadmissible on the ground that no issue of identity, knowledge, or intent was involved.

Turning to the specific exception to the general rule involved in the case at hand, *i. e.*, use of evidence of prior crime to rebut a claim of entrapment, it should be noted that the case of *United States v. Sauvain*¹⁷ closely resembles the instant case. The defendant there was charged with the possession and sale of narcotics. Officers sent an addict, with marked money, into the defendant's house and he emerged with narcotics in his possession. The defendant, seized with the marked money, took the stand and testified to a purported entrapment. On cross-examination, defendant was asked if he had ever sold morphine to another designated person at approximately the same time and, when defendant denied this, such other person was called, in rebuttal, to prove the sale. Approving the use of this evidence, the Court of Appeals for the Eighth Circuit said: "Care should be exercised in admitting evidence of other and distinct offenses . . . However, it appears here that the defendant claims he was entrapped; to meet that issue the government may properly show that the defendant was a dealer and not a victim of zealous officers."¹⁸ The case of *Billingsley v. United States*,¹⁹ wherein it became necessary to show the good faith of the state officials charged with entrapping the defendant, reached much the same conclusion.

¹⁴ *Devoe v. United States*, 103 F. (2d) 584 (1939), cert. den. 308 U. S. 571, 60 S. Ct. 84, 84 L. Ed. 479 (1939).

¹⁵ 31 Cal. (2d) 469, 190 P. (2d) 9 (1948).

¹⁶ 175 F. (2d) 312 (1949), cert. den. 338 U. S. 834, 70 S. Ct. 38, 94 L. Ed. 508 (1949).

¹⁷ 31 F. (2d) 732 (1929).

¹⁸ 31 F. (2d) 732 at 733.

¹⁹ 274 F. 86 (1921).

Approaching the problem from the standpoint of logic rather than precedent, it could be observed that the limitation placed on the use of rebuttal testimony first requires that such testimony should be used only to offset testimony advanced by the other side and should include nothing which could properly have been advanced as proof in chief. Accordingly, rebuttal evidence will be receivable only where new matter has been developed by the evidence of one of the parties and is then, ordinarily, limited to a reply to the new points.²⁰ The issue in the instant case, therefore, could not have arisen if the defendant had not put his innocence and good character in issue by pleading the defense of entrapment. The question then became one as to the way by which the defendant's claim of innocence and good character could be disproved. Professor Wigmore has said there are "three conceivable ways of evidencing defendant's character: (1) reputation of the community . . . (2) personal knowledge or opinion of those who know the defendant; (3) particular acts of misconduct exhibiting the particular trait involved,"²¹ but that, in connection with the third of these methods, it is forbidden, when showing that the defendant has not the good character which he affirms, "to resort to particular acts of misconduct by him."

If, in the instant case, the government had offered its evidence of previous acts simply to rebut the defendant's claim of good reputation, the same would have been clearly inadmissible. Actually, however, the proof was introduced to negative the claim of entrapment, as by showing that the officers had good reason to suspect the defendant and had not simply picked on him in order to pin a crime on him. Put differently, the government sought to show the defendant already possessed a criminal intent and that the same had not been engendered solely by the acts of the prosecution. In that regard, it has been said that, where criminal intent is in issue and the effect of the defendant's testimony has been that he acted in good faith, he may be cross-examined as to similar offenses²² for such cross-examination would tend to show the intent or purpose with which the particular act was done and to rebut the presumption that might otherwise prevail.²³

²⁰ See 64 C. J., Trials, § 176, p. 153.

²¹ Wigmore, Evidence, 3d Ed., Vol. 1, pp. 642-3. The reasons given for denying proof of particular acts of misconduct are (1) an over-strong tendency to believe the defendant guilty of the present charge; (2) a tendency to condemn because he has, perhaps, escaped all or adequate punishment for past misconduct; (3) the unpreparedness of the defendant to meet the attack based on his previous acts; and (4) the confusion arising from the injection of new issues: Wigmore, *op. cit.*, Vol. 1, p. 650.

²² *Todd v. People*, 82 Colo. 541, 261 P. 661 (1927).

²³ *People v. Seaman*, 107 Mich. 348, 65 N. W. 203 (1895). See also *People v. Grutz*, 212 N. Y. 72, 105 N. E. 843 (1914). Cardozo, J., wrote a dissenting opinion concurred in by Cuddeback and Miller, JJ.

The holding in the instant case, therefore, serves to establish more firmly the right of the prosecution to offer evidence of prior offenses for the purpose of discrediting a defendant's self-serving testimony. When a defendant has pleaded he is innocent by reason of entrapment, one way to dispute such a defense would be to show his prior acts of bad character. A degree of discretion should be left in the trial judge to determine whether the evidence relating to prior offenses should be admitted. Before exercising that discretion, the trial judge should consider whether the proof (1) would unnecessarily tend to multiply the issues, (2) would serve to prejudice the jury unduly against the defendant, and (3) would be unnecessary to prove a material fact already well-established. If he conceives neither of these eventualities would result, he should allow evidence of the prior offenses to be admitted for, to hold otherwise, would permit the defendant to use his prior wrongdoing as a shield against the sword of justice.

W. E. STEVENS

HUSBAND AND WIFE—COMMUNITY PROPERTY—WHETHER OR NOT A MARRIED WOMAN, IN A COMMUNITY PROPERTY STATE, MAY BRING AN ACTION FOR PERSONAL INJURIES IN HER OWN NAME AND FOR HER EXCLUSIVE BENEFIT—A problem of little concern to the lawyer practicing in Illinois but of considerable importance in community property states was presented in the recent New Mexico case of *Soto v. Vandeventer*.¹ A two-count complaint in tort for personal injuries was filed therein. The first count, filed in the name of the wife alone, sought to recover damages for her physical injury and pain and suffering allegedly caused by the negligence of the defendant's employee while operating a taxi-cab. The second, brought in the name of the husband as representative of the marital community, sought damages for economic and personal loss suffered by himself and by the marital community during the period of the wife's disability. The trial judge dismissed the first count and directed a severance as to the second claim. On appeal, the Supreme Court of New Mexico reversed the decision, holding that, as each count stated a separate cause of action, it was proper to regard the wife's cause of action as her distinct property, although the husband, as head of the community, could also sue for the injury done to the community.

According to the common law, the wife's legal non-existence made it necessary, during coverture and in order that she might have standing in court, to join her husband in any action which had accrued to her.² This

¹ 56 N. M. 483, 245 P. (2d) 826 (1952).

² Vernier. American Family Laws (Stanford University Press, 1935), Vol. 3, § 179, p. 255 et seq.

procedural disability has been removed in most American jurisdictions by the enactment of so-called "Married Women's Acts"³ which operate to abolish the legal fiction that a husband and wife are one person and give the married woman the same rights as a *feme sole*. She can, therefore, in most common-law jurisdictions, now sue and be sued without being joined by any person who is not a party interested in the litigation. It is true, however, that the husband, not being divested of his right to the services of his wife, given to him by virtue of the marriage relationship, may bring his separate action, in his own right, for any deprivation of his wife's companionship and the like.⁴ Even if the husband should join in the same suit, his claim, while derivative, is separate and distinct from that maintainable by the wife for the personal injury inflicted upon her body, so the proceeds from the latter will go into the wife's separate estate.

In contrast to these common law concepts which prevail in most American jurisdictions, eight of the United States, known as the community property jurisdictions,⁵ have legal systems which do not stem from common law ancestry but which rest, more nearly, on Spanish civil law. The community, or ganancial, system of property there applied dates further back than the common law system⁶ and proceeds on the basis that marriage operates to create a form of partnership between the spouses, at least as to all property acquired by the spouses after the marriage has been celebrated, which property is deemed to have been acquired through the joint efforts of the "partners." Necessarily, such a theory would exclude from its operation all property which either might have owned before the marriage, or which either might acquire after the marriage but not due to their joint efforts, and such property, as well as all right of action arising therefrom, would be classed as separate property.⁷ The presence of such an arrangement projects the question presented in the instant case, one regarding the ownership, and hence the right to sue, on

³ See, for example, Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 1.

⁴ Blair v. Bloom. & Nor. Ry., E. & H. Co., 130 Ill. App. 400 (1906). See also annotation in 21 A. L. R. 1517.

⁵ The states involved are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. For tax purposes, a few other states have adopted aspects of community property law, but have otherwise generally maintained their common-law inheritance.

⁶ deFuniak, Principles of Community Property (Callaghan & Co., Chicago, 1943), Vol. 1, § 2, p. 4 et seq.

⁷ N. M. Stat. Ann., 1941 Comp., §§ 65-304 and 65-305, typical of community property jurisdictions, declare: "All property owned . . . before marriage, and that acquired afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof is . . . separate property." These sections should be read in conjunction with § 65-401, which states: "All other real and personal property acquired after marriage by either husband or wife, or both, is community property . . ."

a cause of action for physical harm done to the wife during the existence of the marriage.

Among these community property jurisdictions, three different views on the point have been established. Under one view, the action must be brought by the husband, or in the name of the husband and wife, and the recovery goes into the community assets. Under another, the wife may bring the action in her own name, but the recovery belongs to the community. Pursuant to the third view, the wife is permitted to maintain her own action and is allowed to retain the proceeds as her separate estate. New Mexico has now, through the instant case, adopted the last of these views. The impact of that holding goes beyond the simple procedural question concerning who should be plaintiff for, in those jurisdictions which follow either the first or second of these views, the negligence of the husband may be imputed to the wife and could operate to bar recovery.⁸ In those jurisdictions, since the community, which comprises both the husband and wife, would benefit from the recovery, it would seem to be just and reasonable to deny recovery to prevent a wrongdoer from benefiting by his own wrongdoing, a result clearly contrary to sound legal reasoning. In jurisdictions following the third of these views, no such problem will arise since the proceeds, being the separate property of the wife, may not be exposed to loss by reason of the negligence of the husband who will not participate therein.⁹

The first view is the one most widely followed by the community property jurisdictions and has, for its constituents, the states of Arizona,¹⁰ Idaho,¹¹ Texas,¹² and Washington.¹³ Courts there look to the statutes defining community property and use a mechanical formula as a test. It may be stated thusly: (1) the cause of action for personal injury inflicted during the marriage is a chose in action which was not in existence prior to the marriage; (2) it was not acquired, subsequent to the marriage, by

⁸ *W. W. Clyde & Co. v. Dyess*, 126 F. (2d) 719 (1942); *Pacific Const. Co. v. Cochran*, 29 Ariz. 554, 243 P. 405 (1926); *Basler v. Sacramento Gas & Electric Co.*, 158 Cal. 514, 111 P. 530 (1910); *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 103 S. W. (2d) 735 (1937); *Ostheller v. Spokane & I. E. R. Co.*, 107 Wash. 678, 182 P. 630 (1919).

⁹ *King v. Yancey*, 147 F. (2d) 379 (1945); *Vitale v. Checker Cab Co.*, 166 La. 527, 117 So. 579, 59 A. L. R. 148 (1928).

¹⁰ *Pickwick Stages Corp. v. Hare*, 37 Ariz. 570, 295 P. 1109 (1931).

¹¹ *Labonte v. Davidson*, 31 Ida. 644, 175 P. 588 (1918).

¹² *Lynch v. American Motorists Ins. Co.*, 101 F. Supp. 946 (1951), held that the husband had a priority but not an absolute right to bring the action, so the wife could act if the husband should shirk his responsibility. See also *Roberts v. Magnolia Petroleum Co.*, 142 S. W. (2d) 315 (Tex. Civ. App., 1940), and *Pacific Greyhound Lines v. Tuck*, 217 S. W. (2d) 699 (Tex. Civ. App., 1948).

¹³ *Ostheller v. Spokane & I. E. R. Co.*, 107 Wash. 678, 182 P. 630 (1919); *Schneider v. Biberger*, 76 Wash. 504, 136 P. 701, 6 A. L. R. 1056 (1913).

gift, bequest or devise; hence (3) it must fall within the statutory phrase "all other property acquired after marriage," so as to constitute community property.¹⁴ The most recent affirmation of this theory appears in the Texas case of *Johnson v. Daniel Lumber Company*,¹⁵ an action brought by a husband and wife for injuries, allegedly sustained by the wife in an automobile accident which occurred some three and one-half years prior to the filing of the suit. The defendant relied on a two-year statute of limitation, to which defense the wife replied that the statute of limitation had not run against her since she was, at all times, under the disability of coverture.¹⁶ The court, sustaining dismissal of the suit, held that the provisions of the statute pertaining to disability were inapplicable since, to have the benefit thereof, the wife would have had to be the proper party to bring the action which, in Texas law, she was not.

It would be proper to note that the Texas legislature tried to correct this dogmatic adherence to mechanistic formulae by passing a statute purporting to authorize the wife to sue in her own name.¹⁷ Unfortunately, the statute was declared unconstitutional, in the case of *Arnold v. Leonard*,¹⁸ when the Supreme Court of Texas held the constitutional definition of the wife's separate property to be exclusive in character. Idaho has also enacted a statutory provision which would purport to allow the wife to bring suit in her own name¹⁹ but no case, directly in point, has yet reached the reviewing courts of that state although dicta in what would appear to be the only two cases argued since the adoption thereof²⁰ leans in the direction that the husband is still a necessary part to the litigation. It should also be noted that courts in the Territory of Porto Rico would decide in much the same way, judging by the holding in the case of *Porto Rico Railway, Light & Power Company v. Cognet*.²¹

The second view, followed only in California, would appear to be a compromise one. It developed out of the case of *Sheldon v. Steamship*

¹⁴ *Labonte v. Davidson*, 31 Ida. 644, 175 P. 588 (1918).

¹⁵ 249 S. W. (2d) 658 (Tex. Civ. App., 1952).

¹⁶ *Vernon*, Tex. Civ. Stat. Ann., Vol. 15, Art. 5535.

¹⁷ Tex. Sess. L. 1915, Ch. 54, p. 103. The text thereof also appeared in Tex. Civ. Stat. 1928, Art. 4615.

¹⁸ 114 Tex. 535, 273 S. W. 799 (1925).

¹⁹ *Ida. Code* 1948, Vol. 2, § 5-304, states: "A woman may while married sue and be sued in the same manner as if she were single. . . ." The section was first enacted in 1903.

²⁰ *Lorang v. Hays*, 69 Ida. 440, 209 P. (2d) 733 (1949); *Labonte v. Davidson*, 31 Ida. 644, 175 P. 588 (1918).

²¹ 3 F. (2d) 21 (1924), cert. den. 268 U. S. 691, 45 S. Ct. 511, 69 L. Ed. 1159 (1924). It was there stated that a cause of action for injuries sustained by the wife, during marriage, was community property and that the husband had to sue to recover damages for such an injury. The court did hold, however, that while the wife was not a necessary party to the litigation, she could be regarded as a proper one since she was a party in interest.

*Uncle Sam*²² in which case the plaintiff wife had entered into a contract of passage with the defendant company. The steamship company breached the contract and caused the plaintiff to suffer an injury to her person by putting her off the ship at a strange port and leaving her without protection or assistance. Two distinct causes of action accrued, one in contract and the other in tort but, on an election by the plaintiff, either cause of action would merge in the other. The court indicated that, if the election went in favor of a contract suit, it would be a misjoinder to include the wife as plaintiff since she was neither a necessary nor a proper party to that action, which would have to be conducted by the husband as the representative of the marital community. If, on the other hand, she wished to litigate the tort case, she would be a proper party even though her husband would have to join therein. The result attained was much the same as one which would have been achieved by a common-law court following the older common-law theory on the point.

The California solution was later changed by the enactment of an appropriate statute,²³ one which makes the mode of acquisition the test to determine whether particular property is separate or part of the community.²⁴ Under it, the cause of action for personal injuries sustained by the wife is still considered to be community property although she may bring an action based thereon in her own name.²⁵ In the case of *Sanderson v. Neimann*,²⁶ for example, a married woman sued individually to recover damages for personal injuries sustained in an automobile collision and the court held that the aforementioned statute created an exception to the otherwise generally recognized principle that it is the husband who must bring all actions relating to community property. This doctrine was carried to its logical conclusion in the California case of *Zaragosa v. Craven*²⁷ wherein it was held that, if a married woman should attempt to bring an action for personal injuries in her own name following an adverse judgment rendered against her husband in an action brought by him alone to recover for his own personal injuries arising out of the same tortious act, the prior decision rendered against the husband would be *res judicata* since the recovery in either case would benefit the community.²⁸

²² 18 Cal. 527, 79 Am. Dec. 193 (1861).

²³ Deering, Cal. Civ. Pro. Code, Vol. 1, § 370.

²⁴ See *Pedder v. Commissioner of Int. Revenue*, 60 F. (2d) 866 (1932).

²⁵ *Frost v. Mighetto*, 22 Cal. App. (2d) 612, 71 P. (2d) 932 (1937). See also *Louie v. Hagstrom's Food Stores, Inc.*, 81 Cal. App. (2d) 601, 184 P. (2d) 708 (1947).

²⁶ 17 Cal. (2d) 536, 110 P. (2d) 1025 (1941).

²⁷ 33 Cal. (2d) 315, 202 P. (2d) 73 (1949), noted in 1 *Stanf. L. Rev.* 765.

²⁸ Dicta in the *Zaragosa* case would lead to an inference that, if the husband and wife should enter into an agreement prior to the bringing of the respective actions to the effect that the recovery realized should be regarded as separate property, the decision of the court on the procedural question might be different.

The third manner of dealing with the instant question is that found operating in Louisiana²⁹ and Nevada³⁰ and now, by virtue of the case under discussion, in New Mexico also. These three states, by statute, have taken the wife's action for personal injuries inflicted during the marriage out of the realm of community property and have placed it in the category of separate property. To that extent, they follow a view consistent with the one followed in the American common-law jurisdictions, with one brief exception. If, in these states, one should injure an unmarried woman, the wrongdoer would be liable to answer to but one action. If, on the other hand, the injury was inflicted on a married woman, the wrongdoer could be subjected to liability in two suits; one conducted by the injured person for her individual benefit³¹ and another by the husband to recover damages suffered by the community,³² although these two actions could be joined if the parties should so wish.³³ The recovery in the community suit, unlike the common-law suit by the husband for loss of consortium, would redound to the benefit of both spouses for the proceeds thereof would be added to the community fund.

The desirability of having courts in the other community-property jurisdictions follow the path marked out by the instant case would seem to be self-evident for the issue represents one of the best examples of social lag which could be noted anywhere. A married woman, generally, is considered to be on a par with her husband in more instances than not. As the court in the instant case pointed out, such a woman would bring her body to the marriage and, on its dissolution, should be entitled to take it away.³⁴ It follows therefrom that she should similarly be entitled to collect compensation from one who may have wrongfully violated her right to personal security. If a kind word has ever been said in favor of the majority holding, it has escaped attention. It is doubtful if a kind word could be said in that direction.

B. A. PITLER

²⁹ See application of Dart, La. Civ. Code, Vol. 9, Art. 2402, in the case of *Hollinquest v. Kansas City Southern Ry. Co.*, 88 F. Supp. 905 (1950).

³⁰ Nev. Comp. Laws, 1943-49 Supp., § 3389.01.

³¹ Chief Justice Breese, in *Chicago, B. & Q. R. R. Co. v. Dunn*, 52 Ill. 260 at 264, 4 Am. Rep. 606 at 609 (1869), once emphasized the point by saying: "A right to sue for an injury is a right of action—it is a thing in action, and is property . . . Who is the natural owner of this right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain."

³² *Rollins v. Beaumont-Port Arthur Bus Lines, Inc.*, 88 F. Supp. 908 (1950).

³³ *Hollinquest v. Kansas City Southern Ry. Co.*, 88 F. Supp. 905 (1950).

³⁴ *Soto v. Vandeventer*, 56 N. M. 483 at 489, 245 P. (2d) 826 at 832 (1952).

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—WHETHER OR NOT A UNION EMPLOYEE MAY BRING A CLASS SUIT IN A STATE COURT TO SPECIFICALLY ENFORCE A COLLECTIVE BARGAINING AGREEMENT MADE BETWEEN HIS UNION AND HIS EMPLOYER—The case of *Masetta v. National Bronze & Aluminum Foundry Company*¹ recently presented the Ohio courts with an issue of first impression. The plaintiff therein, in his own behalf and on behalf of other affected union members, petitioned a state court for specific performance of a collective bargaining agreement entered into between plaintiff's union and his employer, defendant in the case. Plaintiff charged that the defendant, without prior notice, had discharged plaintiff and those whom he represented; had replaced them with new workers; that such action constituted a violation of the collective bargaining agreement then in full force; and that such lay-off caused, and would continue to cause, plaintiff and the other employees similarly situated to suffer irreparable damage by way of loss in wages, loss in seniority rights, and loss of vacation pay. The defendant contended that the state court lacked jurisdiction and moved to dismiss the petition. That motion having been granted in the trial court, the Ohio Court of Appeals, on plaintiff's appeal from the order of dismissal, decided that there was nothing in the National Labor Relations Act² nor in the state constitution which prohibited the state court from taking jurisdiction in such a case. It, therefore, reversed the trial court ruling and remanded the case for further proceedings.

The instant case presents four interesting questions. First, may a state court take jurisdiction over a suit for a breach of a collective bargaining agreement entered into pursuant to the Taft-Hartley Act? Second, is an employee who is also a member of the contracting union a proper party plaintiff in a suit to enforce such an agreement? Third, if the latter is a proper party, may he bring a representative suit to enforce the agreement? Fourth, should a state court grant specific performance as a remedy for a breach of the collective bargaining agreement? Historically speaking, the last three questions have been answered in the negative while the first query has had no answer until now inasmuch as the Taft-Hartley Act³ presents a comparatively recent legislative development with little or no historical background.

In some of the earlier cases, the right of an individual employee to enforce a collective bargaining agreement against his employer was denied

1 — Ohio App. —, 107 N. E. (2d) 243 (1952). Skeel, J., noted a dissent on the ground the allegations in the petition did not make out a class action.

2 29 U. S. C. A. § 151 et seq.

3 29 U. S. C. A. § 301(a).

on the ground that such an agreement was not a valid or enforceable contract;⁴ that no principal and agent relationship existed between the employee and the contracting union;⁵ that the employee had not ratified the agreement;⁶ or that the collective bargaining agreement was not incorporated in the individual employment contract.⁷ With the growth of the industrial age and its corresponding mass employment, courts began to realize the efficacy of permitting members of a union to enforce collective bargaining agreements made between the union and the employer for their benefit. In *Sullivan v. Doehler*,⁸ for example, the court stated that the reasons for this new trend lay in a realization that such contracts had, as their purpose, the lawful procurement of shorter hours, better working conditions, and equitable wage scales for employees. As the benefit thereof would flow to the employee, individually or as a member of a class, and not merely to the union itself as a bald entity, courts realized the inconsistency in admitting that such collective bargaining agreements were made for the benefit of the union employee while denying to the beneficiary the right to sue thereon. Courts, therefore, slowly began to allow individual employees to enforce contracts made between their unions and their employers, at least to the extent such contracts embodied rights inserted for the employees' benefit.

The basis on which recovery eventually became possible took shape in one or more of three theories. The earliest theory was that the union agreement with the employer created a custom or rule for the industry which, in effect, resembled a treaty. Until abrogated, such treaty became a part of every contract for employment.⁹ The second theory treated the union as being the agent of its members, so that the contract, when made, was really a direct contract between the employer and his employees.¹⁰ The third, and incidentally the most generally accepted, theory regarded the collective bargaining agreement as a third-party beneficiary contract, made between the union and the employer for the direct benefit of the

⁴ *Swart v. Huston*, 154 Kan. 182, 117 P. (2d) 576 (1941); *Rentschler v. Missouri Pac. R. R. Co.*, 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1 (1934).

⁵ *Hudson v. Cincinnati, N. O. & T. P. R. Co.*, 152 Ky. 711, 154 S. W. 47, 45 L. R. A. (N. S.) 184 (1913).

⁶ *West v. Baltimore & O. R. Co.*, 103 W. Va. 417, 137 S. E. 654 (1927).

⁷ *Kessell v. Great Northern R. Co.*, 51 F. (2d) 304 (1931).

⁸ 15 Ohio Supp. 122 (1945).

⁹ *Whiting Milk Co. v. Grondin*, 282 Mass. 41, 184 N. E. 379 (1933); *Yazoo & M. V. R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931); *McCoy v. St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); *Rentschler v. Missouri Pac. R. R. Co.*, 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1 (1934).

¹⁰ *Janalene, Inc. v. Burnett*, 220 Ind. 253, 41 N. E. (2d) 942 (1942); *Piercy v. Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Mueller v. Chicago & N. W. R. Co.*, 194 Minn. 83, 259 N. W. 798 (1935).

union employees.¹¹ The last mentioned theory has been emphasized in the Illinois case of *Dierschow v. West Suburban Dairies, Inc.*,¹² where the court said that, in order to qualify under the third-party beneficiary rule, the union member would have to show (1) that he was specifically named in the contract as an individual or be a member of a class there designated which was easily identifiable; (2) the contract would have to be made expressly for the benefit of the individual or the class; (3) the benefit to be received would have to be a direct benefit, not merely an incidental one; and (4) although the third-party beneficiary need not provide the consideration for the contract, it would have to be shown that the contracting parties either intended the contract to benefit the designated individuals or that adequate consideration did pass between the two contracting parties, that is between the union and the employer.

While present-day courts have generally accepted one of the three aforementioned theories and will now, therefore, allow an individual employee to enforce the collective bargaining agreement, a question remains as to whether or not the same union employee can bring a representative or class suit to enforce such a contract. In that connection, the law relating to class suits requires that the plaintiff, suing for himself and all others similarly situated, be a member of a class too numerous to bring before the court, which class possesses a community of interest in a right of action arising from a common source, provided the person in whose name the suit is to be brought will act as a bona-fide representative of the class and has an interest in the outcome of the cause of action. There is no reason to doubt, then, that when all of these elements exist, the principle of the representative suit ought to be applied to an action based upon a breach of a collective bargaining agreement.¹³

¹¹ See *United Protective Workers of America v. Ford*, 194 F. (2d) 997 (1952); *Searles v. City of Flora*, 225 Ill. 167, 80 N. E. 98 (1906); *Cobb v. Heron*, 180 Ill. 49, 54 N. E. 189 (1899); *Kadish v. New York Evening Journal, Inc.*, 67 N. Y. S. (2d) 435 (1946), affirmed in 272 App. Div. 872, 72 N. Y. S. (2d) 402 (1946); *Sullivan v. Doehler Die Casting Co.*, 15 Ohio Supp. 122 (1945); *Ellis v. Hazel-Atlas Glass Co.*, 6 Ohio Supp. 78 (1940).

¹² 276 Ill. App. 355 (1934). See also annotation in 18 A. L. R. (2d) 352.

¹³ *Truax v. Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, 31 L. R. A. 1916 (1915); *Milk Wagon Drivers Union v. Associated Milk Dealers, Inc.*, 42 F. Supp. 584 (1941); *Grand Int. Brotherhood of L. Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934); *Almon v. American Car Loading Corp.*, 324 Ill. App. 312, 58 N. E. (2d) 199 (1944); *Leveranz v. Cleveland Home Brewing Co.*, 24 Ohio N. P. (N. S.) 193 (1922). The case of *O'Jay Spread Co. v. Hicks*, 185 Ga. 507, 195 S. E. 564 (1930), best illustrates the procedural aspects of the problem. In that case, four members of a union brought suit for themselves and all others similarly situated to enjoin the defendant-employer from breaching a collective bargaining agreement. It was held proper to overrule a general demurrer, based on the proposition that each plaintiff had a separate claim and an adequate remedy at law, as the joinder had not created any duplicity or multifariousness. The court went on to say that, where there is a common right to be established by or against several, and one is asserting the right against many, or many against one, equity would determine the whole matter in one action.

Passing to the question as to whether a suit for specific performance of such an agreement would be proper, it should be noted that the remedies available for breach of a collective bargaining agreement depend somewhat on the nature of the tribunal which is to grant the relief. Redress can be had through an arbitration board created pursuant to the agreement between the union and the employer; before an administrative tribunal such as the National Labor Relations Board or the National Railroad Adjustment Board; or before the judiciary. It is clear that even a state court can give relief in an action at law for wages lost¹⁴ or for damages arising from a wrongful discharge.¹⁵ While an equity court may issue an injunction to protect seniority rights,¹⁶ the question of whether the remedy of specific performance is available is one which has given the courts most concern.

Traditionally, a court of equity would not specifically enforce a collective labor agreement, particularly where the contract was one for personal services.¹⁷ Today, however, keeping in pace with industrial progress, courts have concluded that the legal concept of property should be broadened with the changes made in the economic and industrial system,¹⁸ so the right to work has come to be recognized as being as much a property right as is true of the more obvious forms of goods and merchandise. Logically, therefore, since to destroy the means by which wealth could be acquired would be the same as destroying wealth itself,¹⁹ courts have reached the conclusion that the right to earn a livelihood is entitled to protection by a court of equity, through the remedy of specific performance,²⁰ to the same degree as is true of any other property right.

¹⁴ *United Protective Workers of America v. Ford*, 194 F. (2d) 997 (1952); *Novosk v. Reznick*, 323 Ill. App. 544, 56 N. E. (2d) 318 (1944); *Grosso v. General Bronze Corp.*, 57 N. Y. S. (2d) 227 (1945).

¹⁵ *Marranzano v. Riggs Nat. Bank of Washington, D. C.*, 184 F. (2d) 349 (1950); *Kadish v. New York Evening Journal, Inc.*, 67 N. Y. S. (2d) 435 (1946), affirmed in 272 App. Div. 872, 72 N. Y. S. (2d) 402 (1946); *Ellis v. Hazel-Atlas Glass Co.*, 6 Ohio Supp. 78 (1940). But see *Keel v. Terminal Railroad Co.*, 346 Ill. App. 169, 104 N. E. (2d) 659 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 189.

¹⁶ *Ledford v. Chicago, M., St. P. & P. R. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568 (1939), noted in 27 Ill. B. J. 307; *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Chambers v. Davis*, 128 Miss. 613, 91 So. 346 (1922).

¹⁷ *Salinsky v. McPherson*, 45 F. (2d) 778 (1931); *Roquemore & Hall v. Mitchell Bros.*, 167 Ala. 475, 52 So. 423 (1910); *Green v. Pope*, 140 Ga. 743, 79 S. E. 846 (1913); *Clark v. Truitt*, 183 Ill. 239, 55 N. E. 683 (1899).

¹⁸ *Grand Int. Brotherhood of L. Engineers v. Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934).

¹⁹ *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853 (1916).

²⁰ *Montaldo v. Hires Bottling Co.*, 59 Cal. App. (2d) 642, 139 P. (2d) 606 (1943); *Evans v. Louisville & N. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Almon v. American Car Loading Corp.*, 324 Ill. App. 312, 58 N. E. (2d) 199 (1944); *Janalene, Inc. v. Burnett*, 220 Ind. 253, 41 N. E. (2d) 942 (1942); *Baton Rouge Building*

Accepting all this to be true, the remaining query is one as to whether or not a state court should take jurisdiction of a suit based on the breach of a collective bargaining agreement made pursuant to the Taft-Hartley Act. That statute recites that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties."²¹ While this section clearly confers jurisdiction on the federal courts, it will be noticed that it is cast in permissive form, hence does not expressly prohibit state courts, otherwise competent, from exercising jurisdiction over the parties and the subject matter. The Ohio court concerned with the instant case has taken the position that a state court is so empowered to act. The rule so promulgated would seem to be a sound one.

H. GLIEBERMAN

TORTS—INVASION OF PERSONAL SAFETY, COMFORT, OR PRIVACY—WHETHER OR NOT INTERFERENCE WITH AN INDIVIDUAL'S PRIVACY AMOUNTS TO AN ACTIONABLE INJURY IN ILLINOIS—Until the recent case of *Eick v. Perk Dog Food Company*,¹ no appellate tribunal in Illinois had ever passed upon the matter of the existence, or non-existence, of a right of privacy for the citizens of the state. The defendants there concerned had engaged in an advertising campaign under which purchasers of the product of one of the defendants would, by their purchases, enable blind persons to secure guide dogs without charge. Plaintiff, a blind girl made the subject of advertising pictures bearing the legend "Dog owners your purchase of Perk Dog Food can give this blind girl a Master Eye dog," complained that, as this use of her picture was made without her consent, the same amounted to a breach of her claimed right of privacy. She further alleged that, as she already possessed a Master Eye dog and had no need for another, the advertisements caused her to suffer humiliation and mental anguish, but she charged no injury to any property interest.² The

Trade Council v. T. L. James & Co., 201 La. 749, 10 So. (2d) 606 (1942); Hudson Bus Trans. Drivers' Ass'n v. Hill Bus Co., 121 N. J. Eq. 582, 191 A. 763 (1937); Basson v. Edjomac Amusement Corp., 259 App. Div. 1005, 20 N. Y. S. (2d) 924 (1940).

²¹ 29 U. S. C. A. § 185(a).

¹ 347 Ill. App. 293, 106 N. E. (2d) 742 (1952), noted in 41 Ill. B. J. 120, 1952 Ill. L. Forum 459.

² A second count, based on an alleged libel, was dismissed upon motion for failure to state a cause of action. That action was sustained when the Appellate Court failed to find any libel *per se* and observed an absence of allegation relating to special damage.

trial court, on motion, dismissed the complaint for failure to state a cause of action. On plaintiff's appeal, the Appellate Court for the First District, declaring the right of privacy to be a legally enforceable right in Illinois, came to the conclusion that the plaintiff's complaint stated a cause of action, hence required reversal of the trial court judgment.

The court, in arriving at its decision, relied upon the historical development of the right of privacy for support for its conclusion. Recognizing that, under the common law, no provision had been made for recovery of damages where the sole injury sustained took the form of mental suffering,³ the court noted that early attempts to secure relief in equity also failed because of Lord Eldon's holding, in *Gee v. Pritchard*,⁴ to the effect that equity would lack jurisdiction where the alleged right breached was not in the form of a property right. At that stage, the right of privacy was recognized neither at law nor in equity. Under the guise that contract or property rights were being protected, equity did gradually grant a degree of recognition, particularly where the injury grew from the use made of some tangible, once the property of the plaintiff, which the plaintiff may have parted with but did so under circumstances indicating an absence of intention to surrender all claim in the item. That rationale was used principally in connection with cases involving private letters where it was held that the sender would retain a sufficient interest in the letter to restrain the use being made thereof either by the recipient or by some third person.⁵ In much the same way, where a contractual breach caused the creation of the injurious thing, courts relied upon the plaintiff's property interest in the contract to enjoin the invasion of privacy. Thus, where the invasion of privacy was caused by a photographer,⁶ a painter,⁷ an engraver,⁸ or a printer⁹ who exceeded his authority, courts turned to the breach of the employment contract to find a basis for enjoining the injury to privacy.

³ In *Lynch v. Knight*, 9 H. L. Cas. 577 at 598, 11 Eng. Rep. 854 at 863 (1864), Lord Wensleydale stated: "Mental pain or anxiety the law cannot value, and does not pretend to redress, where the unlawful act complained of causes that alone."

⁴ 2 Swans. 403, 36 Eng. Rep. 670 (1818). Lord Eldon there stated: "The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect."

⁵ *Gee v. Pritchard*, 2 Swans. 403, 36 Eng. Rep. 670 (1818), a letter; *Abernathy v. Hutchinson*, 1 H. & T. 28, 47 Eng. Rep. 1313 (1825), lectures; *Prince Albert v. Strange*, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849), etchings; *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109 (1912), letters.

⁶ *Pollard v. Photographic Co.*, L. R. 40 Ch. Div. 345 (1888); *McCreery v. Miller's Groceries Co.*, 99 Colo. 499, 64 P. (2d) 803 (1936); *Moore v. Ragg*, 44 Minn. 28, 46 N. W. 141 (1890).

⁷ *Klug v. Sheriffs*, 129 Wis. 468, 109 N. W. 656 (1906).

⁸ *Prince Albert v. Strange*, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849).

⁹ *Abernathy v. Hutchinson*, 1 H. & T. 28, 47 Eng. Rep. 1313 (1825); *Tuck & Sons v. Priester*, 19 Q. B. D. 629 (1887); *Levy v. Clements*, 175 Mass. 376, 56 N. E. 735 (1900).

Up to this point, courts were concerned in protecting only the property or contractual rights of the plaintiff, not his right to privacy *per se* but, with the publication of a renowned law review article on the point,¹⁰ a demand arose for the granting of recognition to a right of privacy as a right by itself. After meeting with an initial set-back in New York,¹¹ the doctrine was accepted in Georgia¹² and five other states in fairly rapid succession¹³ and eventually achieved such wide acceptance that it is, today, applied in at least twenty-five jurisdictions¹⁴ with only two notable rejections.¹⁵ Acceptance of the doctrine has taken different forms, occasionally appearing in the form of express legislation,¹⁶ more often in the shape of an express rejection of Lord Eldon's views, but sometimes expressed as a right of modern development forming a part of the modern common law.¹⁷ These noteworthy decisions of the sister states, and in England, forming the basis of a modern concept regarding the common law, served as guides for the result reached in the instant case.

¹⁰ Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890).

¹¹ *Roberson v. Rochester Folding-Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902). Gray, J., wrote a dissenting opinion, concurred in by Bartlett and Haight, JJ.

¹² *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905).

¹³ In order of adoption, following the Georgia holding, the next five cases were: *Itzkovitch v. Whitaker*, 117 La. 708, 42 So. 228 (1905); *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 A. 97 (1907); *Pritchett v. Board of Commissioners*, 42 Ind. App. 3, 85 N. E. 32 (1908); *Foster Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); and *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911).

¹⁴ *Smith v. Doss*, 251 Ala. 250, 37 So. (2d) 250 (1949); *Smith v. Suratt*, 7 Alaska 416 (1928); *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931); *Cason v. Baskin*, 155 Fla. 198, 20 So. (2d) 243 (1945); *Pasevich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N. E. (2d) 742 (1952); *Pritchett v. Board of Commissioners*, 42 Ind. App. 3, 85 N. E. 32 (1908); *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918); *Foster Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); *Itzkovitch v. Whitaker*, 117 La. 708, 42 So. 228 (1905); *Graham v. Baltimore Post Co.*, 22 Ky. L. J. 108 (Super. Court, Baltimore, Md.); *Pallas v. Crowley, Milner & Co.*, 322 Mich. 41, 33 N. W. (2d) 911 (1949); *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911); *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P. (2d) 442 (1947); *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 A. 97 (1907); *Thompson*, N. Y. Cons. Laws 1939, Vol. 1, Civil Rights Law, §§ 50-1; *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938); *Friedman v. Cincinnati Local Joint & Executive Board*, 6 Ohio Supp. 276 (1941); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P. (2d) 438 (1941); *Harlow v. Buno Co.*, 36 Pa. Dist. & Co. 101 (1939); *Holloman v. Life Insurance Co. of Va.*, 192 S. C. 454, 7 S. E. (2d) 169 (1940); *Utah Rev. Stat.* 1933, § 103-4-7 and § 103-4-9; *Va. Code* 1950, § 8-650.

¹⁵ *Henry v. Cherry & Webb*, 30 R. I. 13, 73 A. 97 (1909); *Milner v. Red River Valley Pub. Co.*, 249 S. W. (2d) 227 (Tex. Civ. App., 1952).

¹⁶ *Thompson*, N. Y. Cons. Laws 1939, Vol. 1, Civil Rights Law, §§ 50-1; *Utah Rev. Stat.* 1933, § 103-4-7 and § 103-4-9; *Va. Code* 1950, § 8-650.

¹⁷ See 77 C. J. S., Right of Privacy, § 1b. In that regard, compare the rationale used by the Arizona Court, in *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. (2d) 133 (1945), where the court accepted the right of privacy upon the ground that it would follow the view of the Restatement where questions concerning new legal concepts arise, with that expressed in Texas, to the effect that where no right existed at common law at the time when Texas became a state, none can exist without express legislation: *Milner v. Red River Valley Pub. Co.*, 249 S. W. (2d) 227 (Tex. Civ. App., 1952).

Despite this acknowledgement that a right to privacy does exist, it should be noted that it is not one of universal character. Being a purely personal right, it does not inure to the benefit of partnerships,¹⁸ corporations,¹⁹ or animals.²⁰ It is one, however, which may be protected both in law and in equity. The legal remedy for its invasion rests in an action in tort similar, in many respects, to a suit for defamation.²¹ For example, the defense of privilege will be available for both of these torts,²² but the action for interference with privacy differs from that for slander in that an oral publication will not be sufficient for the purpose of the former.²³ Another difference lies in the fact that truth, which may serve as a defense to an action for defamation, will not be a defense in an action involving privacy.²⁴ Perhaps the most basic difference between the two rests on the fact that the suit for defamation deals primarily with the reputation while the one for interference with privacy deals primarily with peace of mind.²⁵ The equitable remedy merely adds the use of injunctive relief to the recovery permissible in a legal tort action.

While the court in the principal case merely made passing reference to limitations based on consent and public interest, these limitations have been spelled out in fuller detail in decisions achieved in other jurisdictions. Although the existence of consent is usually a question of fact for the jury, it has quite generally been held that he who puts himself in the public spotlight thereby waives his right of privacy.²⁶ In the same manner, an application for a copyright or the publication of a book, a play, or a song would cause the same to be submitted to the public,²⁷ placing the public interest in a superior position to that of the right of privacy. A famous personage, or a participant in a newsworthy event, would lose the right of privacy provided the article was published for its news,

18 *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982 (1912).

19 *Rosenwasser v. Ogoglia*, 172 App. Div. 107, 158 N. Y. S. 56 (1916).

20 *Lawrence v. Ylla*, 184 Misc. 807, 55 N. Y. S. (2d) 343 (1945), deals with an unauthorized sale of the photograph of a dog.

21 *Themo v. New England Newspapers Pub. Co.*, 306 Mass. 54, 27 N. E. (2d) 753 (1940).

22 *Warren and Brandeis*, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890), at p. 216.

23 *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1928).

24 *Themo v. New England Newspapers Pub. Co.*, 306 Mass. 54, 27 N. E. (2d) 753 (1940).

25 *Warren and Brandeis*, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890), at p. 197.

26 See *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 191, 238 P. (2d) 670 (1952), a soldier in a famous battle; *Cohen v. Marx*, 94 Cal. App. 655, 211 P. (2d) 320 (1950), a prize-fighter; *Martin v. Dorton*, 210 Miss. 668, 50 So. (2d) 391 (1951), a public official; and *Paramount Pictures v. Leader Press, Inc.*, 24 F. Supp. 1004 (1938), motion picture stars.

27 *Thompson v. Curtis Pub. Co.*, 193 F. (2d) 953 (1952).

rather than for its commercial, value.²⁸ Usage for a commercial purpose, as by way of advertising, if done without consent, clearly constitutes an invasion of privacy,²⁹ but a mere lapse of time will not serve to destroy the newsworthy aspects of the publication.³⁰ Reproduction of a picture having no relation to the accompanying story, serving merely as as illustration to a feature article, would be lacking in newsworthy aspects³¹ and the use of a picture, once newsworthy, but subsequently appropriated for advertising purposes, would also be improper.³² Use, in advertising, of a letter may be an invasion of the right of privacy of either the sender³³ or the recipient,³⁴ particularly where the impression thus falsely created is a plausible one.

Public interest, by contrast, extends beyond those cases involving the publication of news for it includes cases dealing with the exercise of the police power and subsequent legal actions based thereon. It has, for example, been held that the power of the police to keep files of photographs and fingerprints of persons suspected of crime, even though subsequently found innocent, overrides the personal right of privacy,³⁵ but excessive publication, as by display in a "rogue's" gallery, could give rise to a cause of action.³⁶ In addition, while eavesdropping³⁷ and wiretapping³⁸ may constitute invasions of privacy, publication of the facts attending on the arrest and subsequent prosecution will be regarded as matters of public interest.³⁹ Unlawful entry into the home, on the other hand, whether made by a law officer⁴⁰ or a private citizen,⁴¹ could well constitute an invasion of privacy. Insofar as civil proceedings are concerned, a threat to institute a suit would not be an invasion,⁴² even though the claim be erroneous or

²⁸ *Gill v. Curtis Pub. Co.*, 193 F. (2d) 953 (1952), citing Restatement, Torts, § 867, comments C and D.

²⁹ *Pallas v. Crowley, Milner & Co.*, 322 Mich. 41, 33 N. W. (2d) 911 (1949).

³⁰ *Levertton v. Curtis Pub. Co.*, 192 F. (2d) 974 (1952).

³¹ *Gill v. Hearst Pub. Co.*, 38 Cal. (2d) 279, 239 P. (2d) 636 (1952).

³² *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 84 N. E. (2d) 306 (1950).

³³ *Kerby v. Hal Roach Studios*, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942).

³⁴ *Perry v. Moskins Stores, Inc.*, — Ky. —, 249 S. W. (2d) 812 (1952).

³⁵ *Miller v. Gillespie*, 196 Mich. 423, 163 N. W. 22 (1917); *McGovern v. Van Riper*, 137 N. J. Eq. 24, 43 A. (2d) 514 (1945). But see *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N. E. (2d) 755 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 166.

³⁶ *Itzkovitch v. Whitaker*, 117 La. 708, 42 So. 228 (1905).

³⁷ *McDaniel v. Atlantic Coca-Cola Co.*, 60 Ga. App. 92, 2 S. E. (2d) 810 (1939).

³⁸ *Rhodes v. Graham*, 238 Ky. 225, 37 S. W. (2d) 46 (1931).

³⁹ *Coverstone v. Davies*, 38 Cal. (2d) 315, 239 P. (2d) 876 (1952).

⁴⁰ *Walker v. Whittle*, 83 Ga. App. 445, 64 S. E. (2d) 87 (1951).

⁴¹ *Young v. Western Pa. R. R. Co.*, 39 Ga. App. 761, 148 S. E. 414 (1929).

⁴² *Patton v. Jacobs*, 118 Ind. App. 358, 78 N. E. (2d) 789 (1948); *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wash. (2d) 267, 177 P. (2d) 896 (1947); *Voneye v. Turner*, — Ky. —, 240 S. W. (2d) 588 (1951).

unfounded,⁴³ but the giving of undue publicity to an unpaid debt could well give rise to a cause of action.⁴⁴

Now that Illinois has taken a step toward the recognition of a right of privacy it can be expected, if the instant decision should be upheld, that other cases will arise calling for the application of the doctrine to diverse fact situations not heretofore considered actionable in this state. The interest shown in persuasive authority to be found elsewhere, if maintained hereafter, should aid the courts of Illinois as they seek to arrive at the full scope of the doctrine relating to privacy and the potential invasions of that right.

S. GARDNER

⁴³ *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S. E. (2d) 225 (1950).

⁴⁴ *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1928); *Thompson v. Adelberg & Berman, Inc.*, 181 Ky. 487, 205 S. W. 558 (1918); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N. W. 424 (1934).

RECENT ILLINOIS DECISIONS

DESCENT AND DISTRIBUTION—PERSONS ENTITLED AND THEIR RESPECTIVE SHARES—WHETHER DEATH OF ONE ENTITLED TO ELECT EITHER DOWER OR STATUTORY FEE WITHIN TIME FOR ELECTION OPERATES AS A WAIVER OF DOWER—The Illinois Supreme Court appears to have established some new law when called upon to interpret and apply Section 19 of the Probate Act¹ to the facts involved in the recent case of *Krile v. Swiney*.² In that case, a married woman died intestate while the owner in fee simple of a tract of land. She left no lineal descendants but was survived by her husband and certain collateral relatives. The husband died less than ten months after letters of administration had been issued on the estate of the wife and prior to taking any action with respect to dower in the lands owned by the wife. Certain purchasers from the wife's heirs at law thereafter sought to quiet title to the land as against the heirs at law of the husband on the theory that, as the surviving spouse had died during the period within which he could have elected to perfect his dower right, the title to the property should be treated as if he had made such an election, had acquired no more than a life interest therein, and had nothing to leave to his heirs upon his death. The trial court agreed with that theory but, on direct appeal to the Supreme Court as a freehold interest was involved,³ the decree was reversed when the higher court achieved the principle that, under a proper interpretation of the statute in question, a statutory fee interest had vested in the surviving spouse immediately upon the death of the owner of the land, subject, however, to a condition subsequent that no election to take dower occurred during the lifetime of the surviving spouse and within the time fixed by law.

The decision in the instant case completely reverses the law which previously controlled in this type of problem. The case of *Braidwood v. Charles*⁴ had indicated that waiver of dower was a condition precedent to the vesting of a fee interest in the surviving spouse; that where a surviving spouse had died within the period of election, without exercising his election to waive right to dower, the dower right, being for life only, was extinguished and the right to election had terminated; and that the heirs of the surviving spouse, as a consequence, would inherit nothing in the realty in question. This position was subjected to severe criticism,⁵

¹ Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 171.

² 413 Ill. 350, 109 N. E. (2d) 189 (1952).

³ Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199.

⁴ 327 Ill. 500, 159 N. E. 38 (1927).

⁵ See note in 23 Ill. L. Rev. 169.

and a new provision was introduced by the new Probate Act, one which requires the surviving spouse to act to perfect his right to dower during his lifetime or be forever barred thereof.⁶ The decision reached in the instant case hinged on the words "during his lifetime," words which appeared for the first time in the new statute, for the court held that, by reason of the death of the surviving spouse, dower could no longer be perfected during his lifetime, hence the fee interest, provided for by other sections of the statute,⁷ would continue in existence and pass to his heirs upon his death.

Perhaps of even greater importance to the law of property is the fact that the decision in the instant case appears to have effectively reversed the position taken in *Bruce v. McCormick*,⁸ a case decided under the present statute. There the problem was somewhat different. The surviving spouse, in that case, did not die during the election period but gave a quit-claim deed to a stranger within ten months of her spouse's death. The question was whether or not, without waiver of dower, the surviving spouse had a fee interest to pass within that time. The court held she did not and reasoned that the conveyance was not valid as nothing short of a total failure of the surviving spouse to elect dower could be regarded as meeting the terms of a condition precedent to the vesting of a fee interest.⁹ Notwithstanding that holding, the court now holds that an express waiver of, or a total failure to elect, dower is not required as a condition precedent to the vesting of a fee interest in the surviving spouse, but that, on the contrary, the fee interest is vested immediately subject to a possible condition subsequent leading to divestment in the event proper steps are taken, within a proper time, to perfect dower in the manner specified by the statute.

ILLEGITIMATES—PROPERTY—WHETHER AN ILLEGITIMATE COLLATERAL HEIR, OR HIS DESCENDANTS, ARE ENTITLED TO TAKE PROPERTY BY DESCENT—The recurrence of what had been regarded as a settled question of law developed, in the case of *Spencer v. Burns*,¹ because of some apparent

⁶ Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 171.

⁷ *Ibid.*, Ch. 3, §§ 162, 163 and 168.

⁸ 396 Ill. 482, 72 N. E. (2d) 333 (1947), noted in 25 CHICAGO-KENT LAW REVIEW 324.

⁹ The position taken in *Bruce v. McCormick* could no longer be maintained for another reason. By a provision added in 1951, following the decision therein, a surviving spouse who should make a conveyance of real estate, or of all interest therein, prior to the time when the right to claim dower would be barred, is thereby estopped from electing to take dower: Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 173a.

¹ 413 Ill. 240, 108 N. E. (2d) 413 (1952), noted in 41 Ill. B. J. 210.

changes made by the legislature at the time of the adoption of the present Probate Act.² The case was one in which an illegitimate half-brother and the two grandchildren of a deceased illegitimate half-sister of the deceased came, as intervenors, into a partition suit being conducted between the alleged husband of the deceased and her legitimate brother. The trial court decided that the property should be divided equally between the plaintiff and the defendant but that the intervenors were entitled to nothing. The Illinois Supreme Court, on direct appeal because a freehold was involved, affirmed this ruling when it decided that the legislature, at the time it enacted the present Probate Act, had acted to curtail the rights of collateral illegitimate relatives of a deceased property owner who had died intestate.

Prior to the passage of the present statute, the Illinois Supreme Court, in *Morrow v. Morrow*³ and in *Chambers v. Chambers*,⁴ had held that collateral illegitimates were entitled to inherit under the provisions of the Descent Act then in force, particularly because the statute then provided that an illegitimate child was to be the heir of its mother, of any maternal ancestor, and "of any person from whom its mother might have inherited, if living."⁵ For reasons best known to itself, the legislature, at the time of the adoption of the present statute, saw fit to delete the quoted phrase. As the right to inherit, sustained in the earlier cases, had rested on this precise clause, the court correctly concluded that, with the elimination thereof, the older decisions were no longer controlling.

It, nevertheless, proceeded to analyze the present provision to determine whether or not a right of inheritance could rest upon an added phrase which states that, in all cases where representation is provided for, an "illegitimate child represents his mother."⁶ Since there is no provision in the present Probate Act for representation when one of the parents is deceased, the court considered an argument based on this line of reasoning to be ineffective. The only remaining avenue left open to the claimants was to assert that they were heirs of their mother and "of any maternal ancestor." In that regard, the court, defining "maternal ancestor" for the first time in Illinois, said that an ancestor is one who has preceded another in a direct line of descent, *i. e.* a lineal ascendant.⁷ Acceptance of that view necessarily operates to cut off collateral heirs.

² Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 163, formed the basis for the inquiry.

³ 289 Ill. 135, 124 N. E. 386, 24 A. L. R. 561 (1919).

⁴ 249 Ill. 126, 94 N. E. 108 (1911).

⁵ See Ill. Rev. Stat. 1939, Ch. 39, § 2.

⁶ Ill. Rev. Stat. 1951, Vol. 1, Ch. 3, § 163.

⁷ *Pratt v. Atwood*, 108 Mass. 40 (1871).

The court opined that it was barred from granting relief to the intervenors when the legislative intent and direction to the contrary was so clearly indicated,⁸ but it did infer that a contrary result would be socially more desirable and more in keeping with a modern policy to broaden the rights of illegitimate persons. Action by the legislature to restore the deleted phrase, if it should consider the result attained in the instant case to be an undesirable one, would seem to be the only way in which the situation could be rectified.

JOINT TENANCY—TERMINATION—WHETHER OR NOT THE ENTRY OF AN INTERLOCUTORY DECREE FOR PARTITION WILL SEVER A JOINT TENANCY—Unresolved questions concerning the effectiveness of acts designed to terminate a joint tenancy faced the Illinois Supreme Court in the recent case of *Schuck v. Schuck*.¹ The case was one in which a joint tenant, naming his co-tenant as a defendant, sought partition of the real estate owned in joint tenancy.² The court, finding the land to be held in joint tenancy, decreed that each of the parties was entitled to an undivided one-half interest therein and ordered that partition be made. No appeal was prosecuted from such decree. Thereafter, commissioners were appointed and, on their report that division of the property could not be made, a special master was directed to sell the land. Again no appeal was prosecuted. The special master then filed a report stating that the property had been sold, that he had received a down payment, and that the purchaser would be entitled to a deed upon confirmation of the sale and payment of the balance. Before further proceedings could be taken, the plaintiff died. The defendant, with leave of court, then filed a supplemental counterclaim in which she recited the foregoing facts, alleged that the joint tenancy had not been severed, claimed to be the sole owner of the land, and asked that the master's report of sale be set aside and that the complaint for partition be dismissed. The trial court entered a decree in favor of defendant in which it disapproved the sale and dismissed the complaint for partition. The Supreme Court, however, on appeal transferred to it,³ reversed and remanded the case on the ground that the unity of possession, necessary for the creation and maintenance of every estate

⁸ The decision would also appear to have overruled the holding in *Calamia v. Dempsey*, 344 Ill. App. 503, 101 N. E. (2d) 611 (1951), noted in 40 Ill. B. J. 289.

¹ 413 Ill. 390, 108 N. E. (2d) 905 (1952).

² Ill. Rev. Stat. 1951, Vol. 2, Ch. 106, § 44, authorizes a court to decree partition when lands are held in joint tenancy as well as when the parties hold as tenants in common.

³ Cause transferred: 347 Ill. App. 557, 107 N. E. (2d) 53 (1952). Transfer was proper because a freehold interest was involved: Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199(1) and § 210.

in joint tenancy, had been lost when the interlocutory decree for partition had been entered, as a consequence of which defendant was entitled to no more than an undivided one-half interest in the premises.

The law is well settled that a joint tenancy will be terminated by the severance of one or more of the unities necessary to create and to maintain that type of interest.⁴ On the basis thereof, it has been held that a joint tenancy will be terminated by an involuntary sale,⁵ by a conveyance by one of the joint tenants,⁶ the placing of a mortgage on the undivided interest of one of the joint tenants,⁷ and also by an agreement between the joint tenants to hold as tenants in common,⁸ for, in each of these instances, a complete and final severance has occurred. It is equally well settled law that a decree for partition, being a judicial determination designed to settle the rights of the parties, will produce a final determination on the point unless an appeal is taken therefrom.⁹ It should be occasion for no surprise, therefore, that the combination of these two factors should produce the result it did in the instant case. While the precise point had never been presented in Illinois prior to this case, the decision serves to add another factual illustration concerning the variety of ways by which a joint tenancy may be terminated.¹⁰

LANDLORD AND TENANT—PREMISES, AND ENJOYMENT AND USE THEREOF—WHETHER OR NOT LANDLORD OWES DUTY TO TENANT TO REMOVE SNOW AND ICE FROM PRIVATE WALK USED TO ENTER LEASED PREMISES—The plaintiff, in *Cronin v. Brownlie*,¹ was a tenant who had slipped and fallen on a private sidewalk, located on the lessor's land and used by all the tenants of the premises, because the same became icy and dangerous due to natural conditions. There was no provision in the written lease existing

⁴ *Tindall v. Yeats*, 392 Ill. 502, 64 N. E. (2d) 903 (1946).

⁵ *Jackson v. Lacey*, 408 Ill. 530, 97 N. E. (2d) 839 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 189.

⁶ *Szymczak v. Szymczak*, 306 Ill. 541, 138 N. E. 218 (1923).

⁷ *Tindall v. Yeats*, 392 Ill. 502, 64 N. E. (2d) 903 (1946).

⁸ *Dunkin v. Suhby*, 378 Ill. 104, 37 N. E. (2d) 826 (1941). Other aspects of the case were transferred to, and decided by, the Appellate Court in *Sibert v. Suhby*, 315 Ill. App. 147, 42 N. E. (2d) 636 (1942).

⁹ *Rabe v. Rabe*, 386 Ill. 600, 54 N. E. (2d) 518 (1944).

¹⁰ In a still later case, that of *Klouda v. Pechousek*, 414 Ill. 75, 110 N. E. (2d) 258 (1953), it was held that a conveyance of land, registered under the Torrens System in the names of joint tenants, given by one of the joint tenants but intended not to take effect until the death of the grantor, was effective, immediately upon delivery, to destroy the joint tenancy, despite the fact that the deed was not offered for registration until after the grantor's death. The decision extends the holding of *Szymczak v. Szymczak*, 306 Ill. 541, 138 N. E. 218 (1923), so as to make the rule thereof apply to registered lands.

¹ 348 Ill. App. 448, 109 N. E. (2d) 352 (1952).

between the plaintiff and the defendant-lessor imposing any duty on the lessor to keep the sidewalk clear of ice and snow. Plaintiff instituted an action for personal injuries and recovered a judgment against the defendant in the trial court, which court denied motions made on behalf of the defendant for a directed verdict and for judgment notwithstanding the verdict. Thereafter, the defendant appealed to the Appellate Court for the Second District. That tribunal reversed the judgment, without remanding, on the ground that, in the absence of a special agreement, no duty rests upon an Illinois landlord to remove a natural accumulation of snow and ice from a private sidewalk used in common by the several tenants.

Prior to the instant decision, no Illinois reviewing court appears to have had occasion to consider this particular problem. Nevertheless, the question is not a novel one in many jurisdictions and, in those states where the situation has arisen, there appears to be diversity of opinion as to the liability of the landlord.² The distinction between the two views seems to lie in the extent to which the rule that a landlord is bound to keep the premises in a reasonably safe condition should be made to apply. The majority view on the point excludes all those unsafe conditions which arise solely from natural causes, imposing liability only where there has been a failure to make general repairs. The minority view, by contrast, imposing liability upon the landlord even for natural conditions, is based on the premise that there is no logical basis for limiting liability solely to those cases where the negligence grows from a structural defect in the premises.³ It is, therefore, the opinion of the minority view that the landlord's duty to maintain the premises in a reasonably safe condition carries with it a duty to remove natural obstructions such as ice and snow. The Illinois case at hand appears to have accepted what would appear to be the majority rule on the point.

It should be noted, however, that the operation of either of these rules, as applied to natural accumulations of ice and snow, is subject to conditions. Protection may be denied to the landlord, under the first of these views, if it can be made to appear that he has, either expressly or impliedly, assumed the burden of removing the ice and snow.⁴ In that

² See, for example, *Rosenberg v. Chapman Nat. Bank*, 126 Me. 403, 139 A. 82 (1927); *Boulton v. Dorrington*, 302 Mass. 407, 19 N. E. (2d) 731 (1939); *Burke v. O'Neil*, 192 Minn. 442, 257 N. W. 81 (1934); *Turoff v. Richman*, 76 Ohio App. 83, 61 N. E. (2d) 486 (1944); *Oerter v. Ziegler*, 59 Wash. 421, 109 P. 1058 (1910). The opposite result has been achieved in *United Shoe Machinery Corp. v. Paine*, 26 F. (2d) 594, 58 A. L. R. 1398 (1928); *Reardon v. Shimelman*, 102 Conn. 383, 128 A. 705 (1925); *Boyle v. Baldowski*, 117 N. J. 320, 188 A. 233 (1936).

³ See, for example, *Massor v. Yates*, 137 Ore. 569, 3 P. (2d) 784 (1931).

⁴ *Miller v. Berk*, — Mass. —, 104 N. E. (2d) 163 (1952); *Carey v. Malley*, 327 Mass. 189, 97 N. E. (2d) 645 (1951).

connection, it is important to notice that the act of the landlord must be more than a mere gratuity; it must be of such a nature as to create a legal duty, the breach of which would constitute negligence.⁵ On the other hand, the minority view will not impose liability if it can be shown that the landlord had no notice of the unsafe condition.⁶ It should also be noted that the rule, as adopted by the Illinois court, is applicable only to defects brought about solely by natural causes. In other words, if the accumulation of ice and snow could be shown to have been caused, at least partially, by a structural defect in the premises, the rule might not operate to absolve the landlord from liability, unless it could also be shown that the landlord was under no obligation to cure even structural defects.⁷

LIMITATION OF ACTIONS—STATUTES OF LIMITATION—WHETHER OR NOT ADDITION OF LIMITATION CLAUSE TO ILLINOIS DRAM SHOP ACT OPERATES TO BAR A CAUSE OF ACTION WHICH HAD ACCRUED PRIOR TO DATE OF SUCH AMENDMENT—A proceeding to recover damages under the Illinois Dram Shop Act,¹ based on a cause of action which accrued on April 20, 1946, was instituted in the recent case of *Fourt v. DeLazzer*.² At the time of the injury, and in the absence of any special limitation clause, it was reasonably believed that actions of this nature could be instituted within five years. In 1949, however, the legislature amended the statute so as to provide that dram shop actions should be commenced within two years next after the cause of action accrued.³ The complaint in question was apparently filed after the date of the amendment and more than two years after the cause of action had accrued, but within the five-year period. Defendants suitably moved to dismiss the suit on the ground the action was barred,⁴ which motion was sustained in the trial court. The plaintiffs then appealed to the Appellate Court for the Fourth District but that court affirmed the decision, holding that the right to bring suit was controlled by the statute in force at the time of the filing of the complaint rather than by the law in force when the cause of action first accrued.

⁵ *Smolesky v. Kotler*, 270 Mass. 32, 169 N. E. 486 (1930); *Bell v. Siegel*, 242 Mass. 380, 136 N. E. 109 (1922).

⁶ *Drible v. Village Improvement Co.*, 123 Conn. 20, 192 A. 308 (1937).

⁷ *Rogers v. Dudley Realty Corp.*, 301 Mass. 104, 16 N. E. (2d) 244 (1938).

¹ Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 1 et seq.

² 348 Ill. App. 191, 108 N. E. (2d) 599 (1952).

³ Laws 1949, p. 816; Ill. Rev. Stat. 1951, Vol. 1, Ch. 43, § 135.

⁴ Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 172(1)(f), authorizes the use of motion practice in such a case.

Few cases in Illinois have considered the applicability of limitation statutes to dram shop matters. In one early case,⁵ the court intimated that actions brought under the civil liability provisions of the former statute⁶ would be controlled by the five-year statute of limitations,⁷ but, in a later case,⁸ based on a penal section of the former statute,⁹ it was decided that the two-year section of the limitation law was controlling.¹⁰ Any doubt on the point, at least with respect to future cases, has now been laid to rest for the recent legislative enactment makes recourse to the varying provisions of the general limitation statute unnecessary.

The instant case does, however, present a problem regarding the method which should be followed in dealing with those causes of action which had accrued prior to the change in the statute. The answer lies in arriving at the intention of the legislature, that is in ascertaining whether the change was intended to be prospective only or was to have retroactive effect as well. Absent any clear expression of an intent to make the statute retroactive in character, Illinois courts have generally been consistent in holding that each new statute should operate *in futuro* only.¹¹ To overcome this presumption, the court advanced two reasons why the rule should not operate in the instant case. The first involved a construction of one word used in the amended statute, the court indicating that, if the legislature had used the word "accrues," the act would have been prospective in operation, but since it used the word "accrued" the amendment was intended to act retroactively as well. That argument may be a valid one but it does not provide a strong foundation for a decision cutting off existing rights.

The second reason, following a doctrine laid down in the case of *Carlin v. Peerless Gas Light Company*,¹² was to the effect that, where a limiting clause appears in a statute creating a new liability, such clause is not to be treated as a statute of limitation but rather as a condition precedent to liability. According to that theory, a lack of legislative expression regarding retroactive effect would make no difference; the act, as amended, would control from the date of the amendment;

⁵ O'Leary v. Frisby, 17 Ill. App. 553 (1885).

⁶ Starr & Curtis Ill. Ann. Stat. 1885, Ch. 43, § 9. The text thereof is substantially similar to the present statute on the subject, cited in note 3 ante, except for the limitation clause.

⁷ Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 16.

⁸ Dabney v. Manion, 155 Ill. App. 238 (1910).

⁹ See Hurd Ill. Rev. Stat. 1909, Ch. 43, § 8.

¹⁰ Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 15.

¹¹ Compare *People ex rel. Brenza v. Gilbert*, 409 Ill. 29, 97 N. E. (2d) 793 (1951), with *Thompson v. Alexander*, 11 Ill. 54 (1849).

¹² 283 Ill. 142, 119 N. E. 66 (1917). Carter, Ch. J., wrote a dissenting opinion.

and one could not complain that a cause of action which arose prior to the amendment was thereby affected, since such a person would have no vested right in the cause of action.¹³ The Carlin decision, however, was accompanied with a vigorous dissent and, while the case has received additional support in recent years,¹⁴ echoes of that dissent are still heard.¹⁵

Whether rightly or wrongly decided, the instant decision points out the wisdom of instituting suit as quickly as possible when rights have arisen under statutes creating liability since there is always the possibility that some future amendment might curtail, or even abrogate, these rights. It also serves to emphasize the fact that law makers, when creating or amending statutes dealing with periods of limitation, should indicate more clearly the full purport of their intent so as to leave no doubts on the subject.

PLEADING—MOTIONS—WHETHER DEFECT IN COMPLAINT, ARISING FROM FAILURE TO ALLEGE CASE IN THE ALTERNATIVE, IS WAIVED BY DEFENDANT'S FAILURE TO PRESENT MOTION TO DISMISS—A significant issue regarding civil procedure was generated in the recent case of *Lustig v. Hutchinson*.¹ Plaintiff's complaint, naming an alleged principal and his purported agent as defendants, charged a breach of a contract of hiring and sought to recover damages from the principal but, beyond alleging the fact of agency, made no charge, either in the alternative or in a separate count,² against the purported agent. The sufficiency of the complaint was not challenged by motion, but each defendant filed an answer by way of denial. At the trial, a judgment was rendered in favor of the alleged principal, probably because plaintiff was unable to prove authority on the agent's part to act in the principal's behalf, but judgment was given for plaintiff against the agent-defendant. On that defendant's appeal, a majority of the Appellate Court for the First District, while recognizing the vulnerability of the complaint to a motion to dismiss, affirmed the judgment on the ground the defect in pleading had been cured by the failure to raise objection thereto. A dissent, however, was registered on

¹³ See *People ex rel. Eitel v. Lindheimer*, 371 Ill. 367, 21 N. E. (2d) 318 (1939).

¹⁴ *Wilson v. Tromly*, 404 Ill. 307, 89 N. E. (2d) 24 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 274.

¹⁵ See *Theodosios v. Keeshin*, 341 Ill. App. 8 at 19, 92 N. E. (2d) 794 at 799 (1950).

¹ 349 Ill. App. 120, 110 N. E. (2d) 278 (1953). Kiley, J., wrote a dissenting opinion.

² Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 167(2), provides that, where a party is in doubt as to which of two or more statements is true, he may state them in the alternative. Section 148(3) deals with alternative joinder of parties and permits the statement of the claim in the alternative in the same count or in the form of separate alternative counts.

the ground that, as the complaint totally failed to state a case against the judgment defendant, objection thereto could be made at any time.

It has long been established law in Illinois that an agent who misrepresents his authority will be held personally liable for any damages which arise by reason of his misrepresentation.³ However, in those cases where an agent has been so held, the theory of his liability has always been set out in the complaint so as to give the defendant an adequate opportunity to prepare his defense. In the instant case, the single-count complaint alleged a contract with the principal, through the agent, but nowhere in the complaint was allegation made respecting a cause of action against the agent beyond the fact that he was named as a defendant. The majority, in affirming the judgment, relied on the doctrine of *aider by verdict*, saying the judgment cured any defects in the pleading which might have been made the subject of a motion to dismiss. Up to this time, the doctrine of *aider by verdict* has not been without its limitations. As was pointed out by the Illinois Supreme Court in the case of *Lasko v. Meier*,⁴ while a judgment will cure a defectively stated cause of action it will not operate to bar an objection that a complaint totally fails to state a case, since this defect is never waived or cured other than by a suitable amendment. This limitation has been recognized many times⁵ for, while it is true that the Illinois Civil Practice Act should be liberally construed,⁶ such liberality has never reached the point of warranting a judgment, based upon evidence proving a cause of action, where such cause has not been set out in the pleadings. Carried to extremes, such a view would warrant the belief that all pleading could be dispensed with. As the circumstances involved in the instant case clearly fit the purpose underlying the enactment of a practice provision for alternative pleading,⁷ it is regrettable that the majority of the court saw fit to throw the doctrine of *aider by verdict* into doubt instead of requiring the plaintiff to cast his complaint in proper alternative form.

³ *Doggett v. Greene*, 254 Ill. 134, 98 N. E. 219 (1912); *Chapman v. Illinois Midwest Joint Stock Land Bank*, 302 Ill. App. 282, 23 N. E. (2d) 744 (1939); *Willoughby v. Brown*, 190 Ill. App. 51 (1914).

⁴ 349 Ill. 71, 67 N. E. (2d) 162 (1946).

⁵ See, for example, *Owens-Illinois Glass Co. v. McKibben*, 385 Ill. 245, 52 N. E. (2d) 177 (1944); *Gustafson v. Consumers Sales Agency, Inc.*, 346 Ill. App. 493, 105 N. E. (2d) 577 (1952).

⁶ Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 157(3).

⁷ *S. & C. Clothing Co. v. United States Trucking Co.*, 216 App. Div. 482, 215 N. Y. S. 349 (1926), noted in 26 Col. L. Rev. 901; *Lukken v. Francisco*, 194 Wis. 569, 217 N. W. 404 (1928), noted in 5 Wis. L. Rev. 41.

PRINCIPAL AND AGENT—RIGHTS AND LIABILITIES AS TO THIRD PARTIES—WHETHER OR NOT A PRINCIPAL, LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR, MAY BE HELD IN DAMAGES FOR A GREATER AMOUNT THAN THE AGENT THROUGH WHOM HE ACTED—The recent case of *Aldridge v. Fox*¹ involves one aspect of the doctrine of *respondeat superior* which has not heretofore been made the basis of decision in this jurisdiction. The plaintiff there brought suit for false imprisonment, naming the employer and the employee as defendants but using separate counts as to each. Separate forms of verdict were submitted to the jury as to these defendants, without objection, and both defendants were found guilty, although varying amounts of damages were named in the verdicts with the larger sum being imposed on the employer. Following separate judgments on these verdicts, the defendants appealed to the Appellate Court for the First District contending that it was error to hold the principal liable in a greater sum than that assessed against the agent, particularly where the principal was liable solely under the doctrine of *respondeat superior* and had not personally participated in the tort. The Appellate Court agreed, saying that the liability of both the master and servant for the wrongful act of the servant was to be deemed that of but one tort-feasor, for which consolidated or unified wrongful act there could be but one satisfaction.²

The law is well settled that a master and servant may be joined as defendants in an action in which damages are claimed on account of the negligent or other wrongful act of the servant, the master being held under the doctrine of *respondeat superior* even though not personally at fault.³ This rule is predicated on the theory that, as both parties are liable for the consequences of the tort, one action and one recovery will serve to terminate the case and avoid the necessity for separate trials. Equally well settled is the doctrine that a master or a servant may be sued separately, but that satisfaction against one will bar a recovery against the other.⁴ The instant case, however, becomes important in that it reveals the procedure to be followed in case a joint action is maintained. Lacking any precedent in Illinois, the court turned to the New York case of *Sarine v. American Lumbermen's Mutual Casualty Company of Illinois*⁵ for support for the theory that, while the injured person could choose which of two he would seek to hold, he could not multiply his damages for

¹ 348 Ill. App. 96, 108 N. E. (2d) 139 (1952). Leave to appeal has been denied.

² According to a separate *per curiam* opinion, the plaintiff was, on motion, allowed to elect to take a judgment against the employer alone, and did so elect. The judgment against the employer was then affirmed.

³ *Lasko v. Meier*, 394 Ill. 71, 67 N. E. (2d) 162 (1946).

⁴ *Chicago & Rock Island R. R. Co. v. Hutchins*, 34 Ill. 108 (1864).

⁵ 258 App. Div. 653, 17 N. Y. S. (2d) 754 (1940).

a single indivisible injury through the device of suing each in a separate count.

In that respect, the instant case also provides a contrast to the holding in *Shaw v. Courtney*⁶ where the plaintiff pursued separate and independent claims against several defendants, although combining them in one suit because the several wrongs grew out of one transaction.⁷ The jury was there allowed to return separate verdicts as to the several defendants in varying amounts, but the decision is lacking in applicability to the instant case for the plaintiff there actually advanced separate claims against the several defendants, seeking to recover against each upon distinct causes, and the element of *respondeat superior* was not involved. Clearly, in such a case, the injured plaintiff might well be entitled to separate recoveries for varying amounts.

Another striking feature involved in the instant case lies in the fact that the court did not reverse and remand the judgment but allowed the plaintiff to elect to take a judgment for the larger sum against the employer alone at the time he also elected to dismiss the suit and appeal as to the employee. If the plaintiff had sued only the employer and had impressed the jury of his right to the larger of the two amounts, little comment could be made over the fact. Having elected to treat the parties as joint tort feorsors, the plaintiff should have been held to the rule that only one judgment could be pronounced against the joint tort feorsors and, if such judgment was erroneous as to one, it would have to be reversed as to both.⁸ The court appears to have reasoned that it would be illogical to compel an injured party to accept the lesser of two judgments where a single wrong had been committed by a single entity, particularly where each wrongdoer could have been held liable in a separate action. It appears, however, to have overlooked the fact that, since the plaintiff had made his choice, he should have been held to the consequences of his choice. To permit a plaintiff to proceed in the fashion here allowed invites an unjustifiable attempt to gamble on the outcome of every case tried before a jury.

⁶ 317 Ill. App. 422, 46 N. E. (2d) 170 (1943), noted in 21 CHICAGO-KENT LAW REVIEW 249, affirmed in 385 Ill. 559, 53 N. E. (2d) 432 (1944).

⁷ Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 148, permits the joining of defendants against whom liability is asserted either "jointly, severally, or in the alternative."

⁸ While Ill. Rev. Stat. 1951, Ch. 110, § 216(e), authorizes a partial reversal, the same should be read so as to limit the reversal as to one of the parties only in cases where liability, as to such person, has not been shown to exist: *DeMay v. Brew*, 317 Ill. App. 183, 46 N. E. (2d) 138 (1943). For the former practice, see *Seymour v. Richardson Fueling Co.*, 205 Ill. 77, 68 N. E. 716 (1903).

SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—WHETHER A PUBLIC SCHOOL DISTRICT, AS A QUASI-MUNICIPAL CORPORATION, IS IMMUNE FROM TORT LIABILITY WHEN IT CARRIES INSURANCE—In the case of *Thomas v. Broadlands Community Consolidated School District No. 201*,¹ the plaintiff, a minor suing by his next friend, sought to recover for injuries caused by the negligence of an agent of the defendant, a public school district, which injuries were suffered by the plaintiff, a student, while he was in defendant's playground during a recess. The complaint charged that the defendant carried public liability insurance and an offer was made therein to limit the collection of any judgment which might be recovered to the proceeds of such insurance policy. The defendant moved to dismiss the suit on the ground that it had been organized as a quasi-municipal corporation and, as such, was a part of the State of Illinois, hence was not liable in tort. The trial court sustained the motion and the suit was dismissed. The matter was then taken, on an agreed case,² to the Appellate Court for the Third District, which court, by way of answer to certain certified questions,³ held that the defendant, as a quasi-municipal corporation, was not liable for injuries resulting from a tort but, to the extent it had provided insurance coverage, it had waived its immunity from suit. The judgment was, therefore, reversed and the cause was remanded for further proceedings.

As a general rule a school district, being created as a quasi-municipal corporation, is to be treated as a part of the state for most purposes, hence would not be liable in tort for the acts of its servants.⁴ The doctrine of immunity from tort so favoring quasi-municipal corporations was established at an early date in Illinois,⁵ but the historical basis therefor is questionable in character and the only justifiable reason for such immunity would seem to be based on the protection it affords for public funds and public property.⁶ In that respect, the doctrine is similar to the one which was developed, some time later, for the protection of non-public charitable corporations.⁷ This latter doctrine has, in recent years, been forced to yield to the paramount desire to provide protection for the injured person, at least so far as the same can be provided without doing

¹ 348 Ill. App. 567, 109 N. E. (2d) 636 (1953).

² Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 259.48, authorizes such practice.

³ Two questions were presented, to-wit: (1) was the defendant immune from suit, and (2), if immune, did the carrying of liability insurance operate to remove the immunity, either completely or partially to the extent of such insurance?

⁴ *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N. E. 536 (1898).

⁵ *Browning v. City of Springfield*, 17 Ill. 143 (1855).

⁶ See *Leviton v. Board of Education*, 374 Ill. 594, 30 N. E. (2d) 500 (1940).

⁷ *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103 (1905).

injury to the trust funds of the charitable enterprise. A partial waiver of the immunity afforded to these corporations has been recognized in those instances where liability insurance is present⁸ on the theory the immunity is no longer needed to protect trust assets. It is not surprising, therefore, to find the same rationale being carried over to apply to quasi-municipal corporations as well.

STREET RAILROADS—REGULATION AND OPERATION—WHETHER OR NOT GENERAL STATUTE REQUIRING NOTICE TO TRANSIT AUTHORITY OF FACT OF INJURY APPLIES WHERE THE AUTHORITY HAS ASSUMED THE LIABILITIES OF ITS PREDECESSOR TORT-FEASOR—In the recent case of *Barrett v. Chicago Transit Authority*,¹ the Appellate Court for the First District dealt with the problem of whether or not a person injured by a street car, then under the operation of the defendant's predecessor, was obliged to give notice within six months of the injury in the fashion required by the Metropolitan Transit Authority Act.² Part of the consideration for the transfer to the defendant of the street railroad property, which included a certain damage reserve fund, was an agreement by it to assume all the obligations of the predecessor. Plaintiff, at the time of his injury at the hands of the predecessor, had been four years of age. When he reached his majority, he sued the successor corporation but his suit was dismissed in the trial court, on the motion of defendant, because of an apparent lack of notice. On appeal from that judgment, the Appellate Court reversed and remanded on the basis that the suit rested upon the contract for the assumption of liability and was different from a personal injury suit, hence the notice provision of the statute was inapplicable.

The giving of notice concerning the commission of a tort, or of acts leading to the development of a cause of action, is not customarily required in law nor is such a notice deemed necessary as a condition precedent to the institution of suit. This principle is true not only as to private individuals but as to corporations, both public and private,³ although it is clear that the legislature is competent to impose such a requirement, at least as to public⁴ and quasi-public corporations.⁵ Statutes seeking to im-

⁸ *Moore v. Moyle*, 405 Ill. 555, 92 N. E. (2d) 81 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 268, 38 Ill. B. J. 581. See also DeFeo and Spencer, "After *Moore v. Moyle*; Then What?" 29 CHICAGO-KENT LAW REVIEW 107-19 (1951).

¹ 348 Ill. App. 83, 107 N. E. (2d) 859 (1952).

² Ill. Rev. Stat. 1951, Vol. 2, Ch. 111½, § 341.

³ See note in 27 N. Car. L. Rev. 145.

⁴ Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 1—11, relates to notice in personal injury actions against municipalities.

⁵ The notice provisions of Ill. Rev. Stat. 1951, Vol. 2, Ch. 111½, § 341, applicable to personal injury suits against the Chicago Transit Authority, were held constitutional in *Schuman v. Chicago Transit Authority*, 407 Ill. 313, 95 N. E. (2d) 447 (1950).

pose the requirement of notice, however, being in derogation of the common law, will be strictly construed,⁶ although they may, if not otherwise limited, be regarded as being applicable to suits conducted on behalf of minors as well as to those begun by adults.⁷ Even so, statutes of this character will not be expanded beyond their scope so, if limited to suits for injury to person,⁸ the same will not be made to control contract actions. It was, therefore, purely by virtue of the existence of the assumption agreement that the plaintiff in the instant case, being a contract beneficiary, was permitted to succeed. The doctrine of the case should, for that reason, be distinguished from the one likely to be applied in the event a tort suit should be brought by a minor.⁹

⁶ *Northern Illinois Coal Corp. v. Langmeyer*, 342 Ill. App. 406, 96 N. E. (2d) 820 (1951). But see *Kennedy v. City of Chicago*, 340 Ill. App. 100, 91 N. E. (2d) 138 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 380.

⁷ The abstract opinion in *Calabrese v. City of Chicago Heights*, 189 Ill. App. 534 (1914), would indicate that a parent, seeking to recover for loss of services of a minor child, is not required to give notice, since no injury would have been done to his, the parent's, person. The case implies that a notice would be necessary in the event the minor were to sue for his own injury. See also *Martin v. School Board of Union Free Dist. No. 28*, 301 N. Y. 233, 93 N. E. (2d) 655 (1950).

⁸ The text of Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, § 1—11, relating to municipalities, and Vol. 2, Ch. 111½, § 341, referring to the Chicago Transit Authority, includes the phrase "injury to his person." Dictum in the case of *People v. Chicago Transit Authority*, 392 Ill. 77, 64 N. E. (2d) 4 (1945), indicates that the two notice provisions are identical.

⁹ A parallel problem regarding minors' claims for workmen's compensation is dealt with in the case of *Ferguson v. Industrial Commission*, 397 Ill. 348, 74 N. E. (2d) 539 (1947).

BOOK REVIEWS

FOURTH COPYRIGHT LAW SYMPOSIUM: Nathan Burkan Memorial Competition. New York: American Society of Composers, Authors & Publishers, 1952. Pp. xvii, 179.

Renewal of the annual Burkan Memorial competition, following its unfortunate interruption by World War II, has now been marked by the publication of the fourth in the series of symposia dealing with aspects of the law of copyright. As, by the terms of the competition, the law students of the United States are left free to write on any topic of the general subject which may interest them, the several publications in no way constitute a text on the copyright law nor even an intensive investigation into a segment thereof, but the materials reproduced do reflect some of the more crucial issues therein. In keeping with the spirit which led to the establishment of annual awards in honor of the first general counsel, and co-founder with Victor Herbert and others, of the American Society of Composers, Authors and Publishers, the papers here presented reveal a degree of impartial and original thinking on the part of the several student authors which redounds to the credit of the writers, their schools, and to the Society.

The current issue contains four papers, with reference to a fifth which was printed elsewhere. The first, chosen to receive the highest award, stresses the extreme difficulty experienced in drawing the line between the legitimate reproduction of ideas expressed elsewhere on the one hand and legally reprehensible plagiarism on the other. It tests existing judicial decisions falling within that area of the law in an effort to fix the line separating "his from thine" with accuracy. Two of the papers deal with the wisdom, as well as the justification for, a provision in the American copyright law requiring a compulsory mechanical reproduction of protected material in this country as the price for insuring further protection. Still another, contrasting Anglo-American experience with that found in other civilized countries, discusses the moral right of the creator of copyrightable material to protect his intellectual effort, or the product of his creative genius, beyond the limit of the exclusive copyright franchise. It forms an excellent, if narrow, treatise in the realm of comparative law derogating against American provincialism. The last paper treats with the intensely practical subject of income tax consequences attending upon the issue of licenses or grants of reproduction rights. Taken together, they display not only an extremely creditable performance but full and adequate reason for the resumption of the competition.

CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE. Robert Wyness Millar. New York: The National Conference of Judicial Councils, 1952. Pp. xvi, 534.

Notable in the series of books on the court structure of the United States,¹ each looking toward improvement in present methods of judicial administration, is this exhaustive and detailed comparison, made by a distinguished emeritus professor of Northwestern University's School of Law and one-time collaborator on the present Illinois Civil Practice Act, of the procedural systems currently extant in the federal courts, the several states, and in England. Limited to the work of trial courts in civil matters, since companion volumes deal with appellate procedure and with practice in criminal cases, the book is devoted to a complete analysis, historical and otherwise, of the applicable principles and pertinent steps controlling civil litigation from the introduction of the cause to enforcement of the judgment, examined both from the general and the specific aspects thereof. It provides a chart of the course of accomplished reform on the one hand while it serves as a beacon light to guide still further reforms on the other.

It has been the fortune of Anglo-American civil procedure, says the author, to exemplify the truth of certain generalizations regarding procedure at large, particularly those relating to the development and shaping of substantive law through the use of procedural methods; the steady progress from rigidity to flexibility in judicial formulas; the invention, utilization, and eventual rejection of fictions as a means to an end; and the expansion of the procedural mechanism to the point where singleness of issue, regarded essential in a period of immaturity, has yielded to the fullest possible investigation of all aspects of those disputes which are the concern of litigants today. But progress in these matters having been neither constant nor uniform, a degree of diversity presently exists, in those areas following the Anglo-American scheme in general, which should be remedied to the end that all might enjoy the benefits of the most effective procedural devices which human ingenuity can develop.

By providing the contrasts, Professor Millar points the way to changes yet to be effectuated. He offers no ideal code, as he apparently does not believe any of the existing procedural systems to be perfect in every detail. The penetrating analysis he has made, however, reveals the

¹ Earlier volumes include Warren, *Traffic Courts* (Little, Brown & Co., Boston, 1942), reviewed in 22 *CHICAGO-KENT LAW REVIEW* 102; Haynes, *The Selection and Tenure of Judges* (National Conference of Judicial Councils, New York, 1944), reviewed in 23 *CHICAGO-KENT LAW REVIEW* 106; and Vanderbilt, *Minimum Standards of Judicial Administration* (National Conference of Judicial Councils, New York, 1949), reviewed in 28 *CHICAGO-KENT LAW REVIEW* 185.

perfections and imperfections of each variation, making it possible to formulate a wise choice for each of the points covered. Armed with this book, any commission for procedural reform, any bar association committee, should be able to formulate intelligent proposals to bring the local system more closely into line with the ideal that justice should not be delayed nor denied to any man.

ADMINISTRATION OF NATIONAL ECONOMIC CONTROL. Emmette S. Redford.
New York: The Macmillan Company, 1952. Pp. xvii, 403.

The enveloping nature of administration and administrative law, in deep contrast to the service rendered by the judicial department in settling the disputes of individuals, has provoked the publication of a steady stream of books and articles intended either to explain the justification for, or growth in, the administrative process or else to belabor the proponents thereof for undermining the tri-partite system of government. Professor Redford, while obviously inclined in favor of the first of these groups, has here written a detached and completely unbiased commentary on, and explanation of, the administrative process in action taken in its overall aspects rather than in the form of a concentrated study of any particular administrative agency. His analysis of the development of an administrative program, from the establishment of a top-level policy down through the utilization of varied administrative techniques, tools, and organization, both within and without the agency, is searching and detailed.

While not a text-book on Administrative Law, the work would form an excellent corollary to a publication of that character since its emphasis is on operation rather than on legal doctrine or, stated differently, on the effect of law in practice rather than on law in theory. It should not be supposed that this study is merely descriptive in character for each point covered is also dealt with in a critical fashion, leading to the formulation of many important, but presently unresolved, questions concerning the effectiveness of the techniques discussed or the measures which have been adopted, or proposed, to make them so.

That administrative law is here to stay cannot be gainsaid, any more than it would be possible to expect that a twentieth-century civilization would be able to operate along governmental lines laid down in an eighteenth-century atmosphere. It is, however, the belief of all thinking persons, as with the author, that the "real hope for government in a democratic society is that it may find ways of attaining broad and enduring objectives . . . without overextension of the coercive authority of the state over individuals." Works of the character here under consideration should go a long way toward producing a realization of that hope.

STATE AND LOCAL TAXATION: Cases and Materials. Jerome R. Hellerstein. New York: Prentice-Hall, Inc., 1952. Pp. xxiii, 871.

That little fragment of tax law which was taught as recently as twenty-five years ago dealt either with the federal income tax statute and its application or else revolved around the constitutional aspects of the taxing power. The then lack of emphasis on state and local taxation should not generate surprise, for it took almost a century and a half of taxation with representation before annual state tax totals reached the billion-dollar level. By the middle of the present century, however, state tax collections increased to the point where the annual receipts by state treasuries alone exceeded nine billions, with correspondingly larger and larger bites into the consumer dollar at the local level. Not only has the tax "take" expanded but multiple forms of taxation have been developed to make further inroads on the spending power of taxpayers. Demands of this character have naturally excited interest in the legal aspects of taxation, hence few law schools today fail to instruct in the subject of tax law and boards of law examiners have also become tax-question conscious.

The demand for teaching materials has, in turn, generated a response of the character to be expected. Some of the newer books have tended to specialize,¹ others have provided introductory treatment to the subject,² but it remained for Professor Hellerstein to project a comprehensive work covering all forms of state and local taxation. Although real and personal property taxes form the backbone of non-federal levies, considerable attention has been given herein to the newer forms of taxing devices, as well as to tax procedures and tax exemptions. The book contains enough economic data to supply background deficiencies but, with its prime emphasis on law, it could be read with profit by lawyers in practice as well as by students in class. While national in scope, it fits the local scene perfectly.

THE LAW OF MUNICIPAL CONTRACTS WITH ANNOTATED MODEL FORMS. Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1952. Pp. 192.

While most attorneys, as a part of their daily law practice, have occasion to draft contracts covering a wide variety of subject matter, few outside of those staffing municipal law offices will be called upon to prepare, or approve, the specialized contracts which cover the billions of

¹ See, for example, Bittker, *Estate and Gift Taxation* (Prentice-Hall, Inc., New York, 1951), reviewed in 29 CHICAGO-KENT LAW REVIEW 367.

² Consider Anderson, *Taxation and The American Economy* (Prentice-Hall, Inc., New York, 1951), reviewed in 30 CHICAGO-KENT LAW REVIEW 295.

dollars spent annually by federal, state or local governments for the purchase of supplies, materials, and equipment or the construction of public buildings. The details of such contracts are rarely to be found in standard form books, nor has any comprehensive attention been given to the cases which have passed upon the legal problems inherent therein. The need for a practical handbook of the character such as this one becomes the more evident with the tremendous increase in municipal functions.

It is gratifying, therefore, to know that an authoritative set of model forms has been prepared, with annotations to assist in clarifying the technical language therein, covering such points as bids and proposals, general contract conditions, specialized provisions for particular difficulties, as well as model performance, payment and maintenance bonds. These instruments are presented in the framework of an accompanying short text on the law of municipal contracts in general. While of maximum utility to municipal attorneys and purchasing officials, the book is one of peculiar value for the attorney who may be asked to pass on a rare and isolated transaction. It should operate to save him from hours of labor in the process of evaluation and draftsmanship.

HANDBOOK OF LAW STUDY. Ferdinand F. Stone. New York: Prentice-Hall, Inc., 1952. Pp. vii, 164.

Somewhere about mid-point between Professor Redden's "So You Want to Be a Lawyer"¹ on the one hand, and Dean Gavit's "Introduction to the Study of Law"² on the other, would be the place to assign to the third of these recently published books intended to benefit the college student who has yet to determine his life's goal or the beginning student who has already entered the law school. The first mentioned work was designed to provide useful vocational guidance information but said nothing on specific study methods. The second, after some preliminary materials, was intended to guide the student through the maze, some would say the "rat race," of the first year of law study. To that end, it leaned heavily on helpful but rather technical information. This little handbook by Tulane University's Professor Stone, passing beyond the point of the first but stopping short of the ambitious program of the second, does so in a manner sufficient to make it a useful key for the

¹The Bobbs-Merrill Company, Indianapolis, 1951.

²The Foundation Press, Inc., Brooklyn, 1951, reviewed in 30 CHICAGO-KENT LAW REVIEW 203-4. For a related, yet different, approach for the beginner's introduction to law study, see Shartel, *Our Legal System and How It Operates* (University of Michigan Law School, Ann Arbor, 1951).

opening up of Dean Gavit's more elaborate study while serving to resolve the doubts of one uncertain on the question of whether or not to study law. Being brief, it may be rapidly yet profitably read. Being sound, it offers much excellent advice and instruction. Being worthily written, full of "wise saws and modern instances," it is entertaining. Being sincere, it will impress the untrained mind of the ethics and responsibilities of an honored profession. All three books should be in the library of the law student. The lessons of this book, however, are ones he should also take to his heart.

CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. Arthur T. Vanderbilt. New York: Washington Square Publishing Corporation, 1952. Pp. xx, 1390.

No more forceful living crusader for the promotion of judicial efficiency and for the development of a sound, realistic and modern judicial system in America can be found outside of the person of the author of this collection of materials bearing on judicial administration. As practicing lawyer, law school professor, college administrator, judge, bar association president, and prolific author, he has displayed a dynamic energy, an unbounded zeal, which tends to put smaller men and smaller ideas deeply in the shade. One could well expect, therefore, that when he turned to the preparation of a work for the use of law students, designed to introduce them to legal methods of procedure, he would strike at all that was pedantic, out-moded, or to be deplored in the mechanics of conducting litigation and stress the best, the most effective, developments achieved to date. In Judge Vanderbilt's view, and not simply because he had a hand therein, the best yet simplest system of procedure so far developed is that utilized in the federal courts, hence it becomes the framework around which these materials have been assembled. All who will agree with him that there should be but one, and only one, set of rules to follow in seeking the attainment of justice before the courts, whether state or federal, will applaud the choice, for the standard could not have been more happily devised, particularly with its emphasis on the power of the judicial department to regulate procedure before it by rule rather than by statute. With the growing tendency to align state procedural systems to conform to the federal model,¹ the time may yet come when law students everywhere will be obliged to learn only one way of handling litigation,

¹ The author notes, at page 9, that Arizona, Colorado and New Mexico have copied the federal rules for their own complete systems; that Delaware, Minnesota, New Jersey and Utah have done so practically *in toto*; and that twelve others have replaced many of their own procedural doctrines with substantial portions of the federal rules of practice.

leaving them free to spend more time on an ever-increasing load of substantive courses.

Much as one would approve Judge Vanderbilt's plan, however, there is occasion to note that the effect of this monumental collection of material, well in advance of the point of utility for most states, tends to bring about collapse under its own sheer weight, for the scope of the project would appear to transcend student comprehension at the beginner level and, by reason of its extreme breadth, is spread far too thin for the degree of knowledge expected of more advanced students. From the former, it would require too much; from the latter, it would require supplementation by special courses in pleading, evidence, trial procedure and the like. In his effort to spare the neophyte from having to undergo the rigorous training to which he was subjected, the worthy judge has reproduced sections of the classic writings of Maitland on the forms of action at common law and of Langdell's summary of equity pleading, but it is doubtful if the mere reading thereof would inform as well as would the perusal of some simpler version thereof.² He is, without doubt, correct in his thesis that older methods of instruction, resulting in severe compartmentalization of the subject, furnished a disjointed and often incomplete picture, with some of the gaps never supplied to the student anywhere in school. These deficiencies he has cured, for nothing has been omitted in this effort to furnish a comprehensive work. Its full utilization, however, must await the day when diverse state systems of procedure yield to the federal model.

A PSYCHOANALYTIC LAWYER LOOKS AT MARRIAGE AND DIVORCE. John H. Mariano. New York: Council on Marriage Relations, Inc., 1952. Pp. vi, 276.

There has been unquestionable occasion for concern over the increase in the divorce rate and the fragility of modern marriage, but most panaceas proposed to date have looked in the direction of further legislative tinkering with what is not solely or essentially a legal problem nor one capable of resolution by customary legal methods. Divorce, whether liberally administered on a national basis pursuant to some uniform code or made increasingly difficult to obtain by reason of a tightening up of local laws, is not a cure although it may provide incidental relief for those involved in deeper and more fundamental emotional problems. Divorce has, therefore, and properly so, become the concern of the psychiatrist, the sociologist, and others specially trained in human ills and human welfare.

² See, for example, the non-technical presentation of common law, equitable, extraordinary, and statutory remedies in Kinnane, *Anglo-American Law* (Bobbs-Merrill Co., Indianapolis, 1952), 2d Ed., pp. 608-89.

But as is usually the case with other developing sciences, any new approach to a given field of activity is likely to attract the attention, and invite the writing, of those who may not be eminently qualified therein. Not that the author is not qualified to discuss his subject from the standpoint of a lawyer for, by his own admission, he has acted as attorney for one side or the other in each of the cases he describes in this his newest work. The reviewer wonders, however, as he reads the text, whether the author's interest in marriage counseling is that of the professionally-trained psychiatrist or is that of a therapist who has developed a modicum of skill but one which falls short of professional attainment. As to the work itself, it could be said that one who would seek authoritative information on the subject would do better perusing Professor Fowler's latest work,¹ for there is little more here than a veritable hodge-podge of miscellaneous illustrations, viewed from varying angles, mingled with some legal and psychotherapeutic information. The book would be of doubtful value to the lawyer and would seem to be of even less worth to the layman.

ILLINOIS PROBATE LAW AND PRACTICE. William M. James. Chicago, Illinois: Burdette Smith Company, 1951-52. Eight volumes, pp. lxxxii, 4490, including forms, tables and index.

With the publication of the concluding volumes of this up-to-date, comprehensive, and reliable treatise on an important segment of Illinois law, it is now possible for the local lawyer to appreciate fully the aid that a work of this magnitude can provide in resolving the tasks connected with daily practice. Prepared by a former Chairman of the Section on Probate and Trust Law of the Illinois State Bar Association, one largely responsible for the enactment of the present Probate Act, the set may be regarded as being as authoritative a publication in its field as could be found anywhere, for the author has been in a strategic position to plumb past decisions, compare new statutory provisions with old, and to forecast decisions bound to be written under interpretations not, as yet, clearly defined. The preparation of earlier materials on the subject undoubtedly sharpened the discernment and skill of the author to handle the voluminous detail involved in the present work. The extensive subject matter has, therefore, been capably broken down, arranged, and classified into an exhaustive treatise of the type seldom seen today. Although the central theme of the work turns around the Probate Act, and practices thereunder which control the administration of estates, it nevertheless treats with matters which

¹ Fowler V. Harper, *Problems of the Family* (The Bobbs-Merrill Co., Indianapolis, 1952).

might be regarded as collateral thereto for the author has endeavored to provide a permanent guide to the subject. The set, then, is of such value and importance that it ought to be on the library shelves of every Illinois lawyer.

THE FEDERAL INCOME TAX, Second Edition. Joyce Stanley and Richard Kilcullen. New York: The Tax Club Press, 1951. Pp. xviii, 374, and 1952 Supplement, pp. 11.

The initial edition of this brief and simple commentary on the federal income tax statute, with its accompanying regulations, was noted by the statement, among others, that the book "has balance."¹ It might be observed, in a discussion of the second edition thereof, that nothing has been done to disturb that judgment for, in the main, the new edition is identical with the earlier volume both as to format and content. Justification for some slight revision does lie in the fact that certain changes have been made in the law by Congress, requiring the addition of new sections to the book to provide a place for the discussion thereof, as in the case of the "spin-off" and "split-up" types of corporate reorganization or the tax consequences of employee stock options to mention but two instances. There has also been the development of a degree of clarification in the tax law provided through a few recent judicial decisions, each herein noted.

As the first edition was declared to be a worthy guide to any study of income tax law, there is no reason to withhold the same comment regarding the new one. It is doubtful, however, whether a complete reprinting should have become necessary for the changes noted, while significant, are not of revolutionary character and might well have been disseminated, as is true for those occurring in 1952, through the use of cumulative pocket-part supplementation. The practice of reprinting, carried to extremes, could well evoke horror over the staggering financial burden which could be imposed if entire sets of annotated statutes, or encyclopedias for that matter, had to be replaced whenever a new law was enacted or a new judicial decision was announced. The same thing is true, to a lesser degree, in the case of a new edition of a good work not clearly out of date.

¹ See review of Stanley and Kilcullen, *The Federal Income Tax* (Clark, Boardman Co., Ltd., New York, 1948), in 26 CHICAGO-KENT LAW REVIEW 364-5.